In the Circuit Court of the United States

OF THE NORTHERN DISTRICT OF NEW-YORK.

ARGUMENTS

OF

JOHN H. REYNOLDS AND N. HILL, JR.,

OF ALBANY,

COUNSEL FOR THE DEFENDANT,

ON MOTION BY THE COMPLAINANTS FOR A PRELIMINARY INJUNCTION,

November 19th to 21st, 1856.

FREDERICK W. COLEMAN vs. THE HUDSON RIVER BRIDGE COMPANY AT ALBANY;

AND

ROBERT D. SILLIMAN vs. THE SAME DEFENDANT.

BEFORE JUDGE NELSON.

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2671

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ARGUMENT OF JOHN H. REYNOLDS.

MAY IT PLEASE THE COURT:

I shall endeavor, as briefly as I can, to relieve the question involved in the present motion from much irrelevant matter that has been thrown around it by the learned counsel for the complainants. It appears to me that a great part of the opening argument would have been more properly addressed to the Legislature of the State than to this court. In our view of the real issue, as it is now presented, much that has been urged with such zeal and eloquence, in support of the prayer for an injunction, will be found quite immaterial to the determination of any question of law or of fact which, by the complainants' bill, calls for judicial notice. So far as the counsel for the defence are concerned, we propose to confine the discussion here, on our side, to those points of law and fact which appear material to the proper disposition of this motion; and it will be mainly my effort to put your Honor in possession of the facts of the case, leaving my associate to show that by no rule of law hitherto approved can this motion be sustained.

My friend, who opened this argument, complains that the defendant has not yet definitely determined the precise plan of the bridge it is proposed to erect across the Hudson, at

Albany. It is assumed that we are at fault in this regard; and Mr. Corning is censured for stating in an affidavit the progress in fact made towards the erection of a bridge, and that the company do not intend to violate the law. It certainly is not our fault that we have been thus early summoned into this court. We are here upon the invitation of our adversaries, and it should not be charged upon us that we appear too soon to subserve the purposes of the complainants.

It was stated that the charter of this company had been granted for nearly a year, and the gentleman seemed to insinuate that this fact implied a doubt of the truth of the statement that the plan of the bridge had not, during all this time, been fixed, and that the aspect of the case thus presented was an indication of some unfairness towards the complainants upon the question now before the court.

In all these particulars my learned friend is greatly mistaken in fact. The act authorizing the construction of the bridge was passed by the Legislature on the 9th of April last. By attending to its provisions, it will be seen that the corporation could not be organized until after the commissioners named in the act had received subscriptions to the stock and fixed the location of the bridge. It is shown in the bill that the commissioners did not determine the location until the 21st of August, and on that day, pursuant to the act, the first election of directors was appointed for the 24th of September. That election was held on the day named, and on the 25th the Bridge Company, as appears by an affidavit annexed to the complainants' bill, gave public notice that plans and specifications for the superstructure of a bridge would be received at any time within sixty days, and a premium of $500 offered to the party whose plan should be approved. That time has not yet elapsed. On the 17th of October this suit was commenced and notice of this motion given; and it is now made a matter of complaint

2673

that we have not furnished our adversaries with greater facilities for carrying on a litigation against us.

The learned gentleman is also dissatisfied with the affidavit of Mr. Corning. He states that no plan of a bridge has been fixed upon by the company; that it is intended to construct a bridge strictly according to the terms of the charter, so that it shall not obstruct or impede the navigation of the river in any material degree; and that, to achieve this object, no possible care, skill, effort or expense will be omitted. He further says that the Bridge Company have never contemplated or threatened the erection of any bridge at Albany which will interpose any substantial impediment to the free navigation of the river by every species of craft which can now navigate the same at and above the port of Albany.

It is charged in the bill that the defendant intends to erect a bridge which will materially obstruct navigation, and, hence, in violation of its charter and without legal authority. This averment is untrue in fact; and it was incumbent upon us to meet, at once, such an injurious and unfounded imputation by showing the court precisely what we had in fact done, and also what we intended to do.

It is quite certain that this aspect of the case is not what the gentleman desired, and does not furnish the entertainment to which they invited themselves and us. It disposes of some of the eloborately prepared and printed points presented to the court, and a very large proportion of the oral argument which has been submitted by my learned friend. For pursuing the theory of the bill, the gentleman has printed and submitted a point in which he avers that the act requires the bridge to be constructed "in such manner as to cause no substantial impediment or obstruction to the free navigation of the said river." "The proof shows," proceeds the counsel, "that the defendants threaten and intend to violate this restriction. In their proposed erection they are acting beyond their charter authority and wholly without right."

Upon this statement of the position of the complainants, it can be seen whether there is anything uncalled for in the affidavit of Mr. Corning, or whether the defence can be properly charged with unfairness. We were untruly charged in the bill with an intention to violate the law of the state and to impede the operations of commerce. We have merely met this unfounded allegation with a prompt and emphatic denial. I find nothing in all this that called for imputations upon the integrity of the position of the party which we are here to protect and defend.

It is urged, however, by the learned counsel, that the facts stated in the affidavit of Mr. Corning are comparatively unimportant, as it is obvious, from other proof in the case, that the defendant does intend to erect a bridge which will obstruct navigation, and hence in violation of the law of the state and the laws of Congress.

To support this position reference is made to the depositions of several engineers, read in our behalf, in which a bridge is described which they regard practicable, and which may be constructed so as not to interfere with navigation or violate any of the provisions of the charter of the company. If my friend had carefully examined these depositions, and the interrogatories to which they are mainly in reply, he would have found it stated that the Bridge Company had not determined upon any plan of bridge to be erected under the charter. The several gentlemen whose depositions are referred to were each advised of the provisions of the charter, and the general character of the bridge authorized to be constructed, and they were requested in their replies to suggest such plans as they might regard practicable, so as to enable the company to accomplish the object in view, and construct a bridge which should afford the requisite accommodation for the internal traffic of the state, and not in any essential degree impede the movements of the navigator. All that appears in these depositions, in respect to the form of the

2675

bridge—the size and number of the piers—the length of span and the description of the draws—is but the suggestions of gentlemen of distinguished reputation and of large experience, who unite in saying that a bridge of the character required is entirely feasible and may be so constructed as to present no material impediment to navigation. These suggestions may or may not be adopted by the defendant. That they are entitled to great consideration here and elsewhere no one will deny. But the learned counsel, in advance of any action of the defendants, finds himself obliged to assume that these suggestions have been adopted and approved, and then further to maintain, in direct opposition to the evidence he invokes, that the structure described will in some essential degree interfere with navigation. If it can be shown by our adversaries that a bridge of the description indicated by the several gentlemen whose depositions are referred to, erected upon piers placed in the channel of the Hudson, will obstruct navigation, then we can point to the positive and emphatic affidavit of the president of the Bridge Company, to show that no such structure is threatened or intended.

In presenting this case to the consideration of your Honor, it is assumed by the counsel that these bills, although filed in the names of private citizens, are really suits on behalf of the corporation of Troy, to enjoin the commission of an act which, it is said, threatens her commercial prosperity. It is in this liberal aspect that the argument on the part of the complainants has thus far proceeded. The counsel took leave of the particular cases before the court, in an early part of the discussion, and proceeded to declaim, with great ability and eloquence, upon the general interests of commerce and navigation, so far as they concern the welfare of the city which assumes to conduct and control this controversy. We do not suppose that this question is to be thus considered in this court. The city of Troy is not here, ex-

cept in the character of a volunteer, to invest these cases with the dignity of her municipal patronage and her fancied commercial importance. If her commercial and business interests are threatened or endangered she must appeal to the Legislature for redress. It is for that body to make all needful regulations in respect to local or internal trade. It may open new or discontinue old avenues of travel and traffic. It may charter new cities and foster and encourage new marts of commerce, to the detriment of rival interests, and its jurisdiction in this respect is complete, exclusive and absolute. But we do not find that the courts of the United States are organized to review these determinations or entertain complaints of cities who may suffer in their commercial interests by the opening of new facilities for trade under the sanction of a state legislature.

It is our belief that, in this court, we must look for the merits of the plaintiffs' case in the bill filed, and in the evidence, which is pertinent to the issue there presented. Any debate beyond this limit we have regarded idle and unnecessary.

I shall therefore, at the risk of wearying your Honor's patience, be obliged to refer somewhat in detail to the nature and kind of proof relied upon to sustain the allegations of the bill, and, in so doing, shall endeavor to strip the case of many of the extraneous and immaterial matters with which it has been the effort of counsel to surround it.

And I may say, in the first place, that the testimony, voluminous as it is, embodies but a few general facts that are at all material to the controversy here, and your Honor must have already observed, on hearing the complainants' proof read, that beyond a few facts which relate to the question now to be considered it consists of mere opinion, much of it given long ago upon a different state of facts, and wholly unreliable for present use; and upon this mass of material and immaterial matter, in advance of any actual experiment, the

3677

extraordinary power of this court is invoked to practically annihilate the legislation of a sovereign state, which, upon its face, is constitutional and valid.

It is entirely undeniable that the present motion stands in this position. It has been presented and urged in this aspect, and judgment is demanded, in the name of the city of Troy, that an act of the legislature of the State of New-York, entirely constitutional upon its face, shall be declared null and void, and all action under it summarily arrested.

It was urged by the counsel on the other side that, in all that concerns the regulation of commerce, there was no divided jurisdiction between Congress and the legislature of any state. If it be true that in this particular the laws of Congress be paramount, it by no means follows that any conflict must necessarily arise between the legislation of the general government and the act under which we proceed. The act of our Legislature does not in any way assume to regulate the commerce upon the Hudson river; nor has it any connection with it, except so far as it involves the question of fact, how far the structure authorized by it may interfere with navigation, and it expressly provides that the bridge to be erected shall not materially or essentially impede or obstruct the operations of the navigator. It relates to a subject peculiarly and exclusively within the jurisdiction of state legislation. The erection of bridges over the navigable waters within the territorial limits of any state is exclusively the subject of state legislation, and Congress has no authority over it. We have, then, a state law, constitutionally enacted, relating to a subject exclusively within the power of a state legislature, and in respect to which Congress has no power whatever. Congress may pass laws regulating commerce upon the river, and the state may pass laws authorizing bridges over it for the convenience of its internal trade and traffic. It cannot follow necessarily that there is any incompatibility in the exercise

of either of these independent powers. In their nature there is no inevitable collision. It may happen that by the improper exercise of the one, it conflicts with the enjoyment of the other. That fact can be ascertained only after actual experiment. The state law carefully guards navigation from any material impediment. It respects the laws of Congress and the rights of navigation. It authorizes no bridge that shall present any material obstruction to any craft that is entitled to the freedom of the river. Hence, we see that the precise question is whether this court shall annihilate a state law which respects all the paramount rights of Congress and the freedom of navigation, which provides for a bridge that shall interpose no substantial impediment to the progress of any vessel entitled to float upon the waters of the Hudson, which is loyal to the general government in every material provision, — whether such a law shall be rendered inoperative, and the power of the state to regulate its internal concerns for the convenience of its own citizens, denied and repudiated upon the unfounded pretence that it is intended by the defendant to violate the franchise granted to it. Indeed, I understand the learned gentleman to admit that if the provisions of this act can be carried out, if the company can construct a bridge across the Hudson river at Albany that shall not present any substantial impediment to navigation, in such case there will be the violation of no right of navigation which authorizes this court to interfere.

Mr. BEACH: I do not concede that.

Mr. REYNOLDS: If the gentleman does not concede that proposition, then he must assume that a state legislature has no right to authorize a bridge across a navigable water for the convenience of its citizens, even if it does not at all impede or interfere with the operations of commerce—a position which my learned friend will find it difficult to maintain in any court—and a position at war with the theory of the case

2679

as stated in the bill and as it has been presented to the court. For it has been the effort of my friend, from the beginning, to show that although the act authorized the construction of a bridge which shall not materially interfere with the navigation of the river, yet that in view of the nature of the bed of the river, the contraction of its channel, the effect of piers, and the immense commerce of Troy, such a structure was a physical impossibility.

It seems to me that the learned gentleman must repose upon either one or the other of these positions. If by the provisions of this act the Bridge Company are not authorized to build a bridge which shall impede navigation, then there is no law of the state which provides for or contemplates any collision between it and any law of Congress, and no occasion for the aid of this court, unless it is clearly shown that such a bridge is an absolute impossibility. If this position is not satisfactory, then the gentleman is forced to maintain that there is no power in a state legislature to authorize the bridging of a navigable stream, which does not impede navigation, even when such a measure is demanded by the most urgent necessity for the accommodation and convenience of its internal trade and traffic. In either aspect, the question presents no common difficulty to a plaintiff, who seeks, on such grounds, to nullify state legislation by means of an injunction from this court.

Before adverting particularly to that portion of the testimony upon which we rely, I desire to refer to that relied upon by the complainants to establish the several propositions submitted by the learned counsel. So far as that testimony relates to the action of the general government upon the Hudson river, at and near Albany, there is no conflict. It appears that everything done by way of improvement of the navigation of the river was done some years prior to 1841. Mr. Leadbetter, the engineer having it in charge, says that the work was left unfinished and incom-

plete. Other testimony shows that most of the work done by the government was afterwards carried away by freshets, and that no actual experiments have since been made by any branch of the United States government. The consequence has been that, in order to maintain even an imperfect navigation, it has been necessary for the city of Troy to keep in constant service a dredging machine, under command of Capt. Smalley.

In the second proposition of fact submitted by counsel, it is asserted that the evidence shows that the currents and bed of the river in the vicinity of the bridge is constantly shifting and changing, and that the bed of the river is composed of light unstable land, easily disturbed by the action of the water and any obstacle to its currents. Upon this point the evidence of Mr. Leadbetter, taken in 1841, is referred to. He states that Randall's survey of the river was made prior to the erection of the Albany pier; that the erection of the pier has made a difference in the soundings at Albany, which he had not particularly investigated. He also states that the bed of the river opposite Bath, and thence down to the Albany pier, is of coarse sand, of a quality to be shifted by any increased velocity of the current. I refer to this to show, what I think is true of all the evidence in the case (except that now furnished by the defendant), that it does not relate to the channel or bed of the river at the site of the bridge, but to other portions of the stream. Mr. Leadbetter's evidence, it will be seen, refers to the condition of things at and near Bath, nearly a mile above the bridge; and above that point are the devious, uncertain and shifting channels, in respect to which all the witnesses agree.

In this connection I desire to call attention to the deposition of Mr. McAlpine, who has had great experience in respect to the channel at, above and below Albany. His knowledge is derived not only from observation, but from

1892

actual survey as State Engineer, under the direction of the Legislature, with a view to the removal of sand bars. He says that, at Bath, the channel of the river deflects towards the city of Albany, near the upper end of the pier. From that point down it is direct and of uniform current for two miles, and about midway is the location of the bridge. There is no evidence to show that at any time navigators have been subjected to material inconvenience by reason of the formation of sand bars opposite Albany, or within the distance of two miles.

It is further said by Mr. McAlpine that, by the erection of the Albany pier, and of docks upon the easterly shore of the river, with a true current and the absence of shore projections tending to disturb it, the nature of the bottom is such that sand bars are not likely to be formed. The actual survey made of the bottom of the river at the bridge, by George E. Gray, shows it to be of clay and hard sand, not likely to be disturbed by the action of the current. This view of the question is concurred in by Messrs. Edwin F. Johnson, Ellwood Morris and Ward B. Burnett, whose depositions have been read by us. They are not in conflict with Mr. Leadbetter, for his evidence relates to the river a mile above the bridge.

It is, perhaps, proper here to say that the theory in relation to the formation of sand bars, concurred in by all scientific men, is substantially this: That by reason of any obstruction in the channel, which contracts the water-way, the velocity of the water near the obstruction is increased in proportion to the extent of the obstruction. This acceleration of the water tends to disturb the light sedimentary matter at the bottom, and it is carried down with the increased current until it subsides into the ordinary flow of the stream. The loose matter thus disturbed and carried down by the increased current into still water is deposited at the bottom, and, if in any considerable quantity, a sand bar is likely to

form. In this theory there is no disagreement. All the engineers, likewise, agree in saying that piers of the size and description requisite to support the proposed bridge will not tend to increase the velocity of the current, in ordinary times, in any sensible degree, as they will not contract the water-way so as to cause any material increase in the velocity of the current. It is said, also, in the same connection, that it is proposed to enlarge the water-way at the site of the bridge, by dredging the bottom, so that the sectional area of the river, or the space for the passage of the water, will be greater after the erection of the bridge than now. This guards against any possible danger of the formation of sand bars by reason of the erection of piers in the channel.

The testimony of Robert D. Silliman, given in 1841, is also referred to, to sustain the proposition that the bed of the river at Albany would facilitate the formation of sand bars. He says nothing about the river opposite Albany. He has observed the filling up of the channel below the piers of the Troy bridge, and bars have formed extending down one-quarter of a mile, and filled the channel so that vessels have to be lightened to enable them to pass over and reach the docks at Troy. In another place he says that some years ago a bar was formed by an ice dam above Bath. He also remembers one at the Fish-house bar, and says that the different bars at other places have shifted more or less by the currents and ice. This is all Mr. Silliman says on the subject, and it proves nothing respecting the river at or near Albany.

The evidence of John Truesdell, also given in 1841, comes no nearer the point. He says that the channel changes and bars form by the breaking up of ice in the spring; sometimes new channels form. He then speaks of an island above Bath, called Bath Island, which commenced forming in 1796, in or near the then channel, and it is now a considerable and substantial island.

2683

This is all true, but it relates to a place quite distant from the bridge, and proves nothing as to the channel or bed of the stream at Albany.

William Noyes, also swôrn in 1841, does not speak of the Hudson river at all. He only relates his experience as to the formation of a sand bar at the mouth of the Connecticut river, by reason of the erection of a large pier for the purpose of fishing.

Daniel T. Wandell, in 1841, speaks of the bar above Bath beginning in 1788, and now known as Bath Island. He describes the gradual formation of this island, and relates the fact that a sloop of his was frozen in, between Troy and Albany, in the winter of 1798, and the formation of a bar in its vicinity. He also speaks of Washington bar and another below Breakers Island, which is considerably above Bath. He then speaks of Castleton bar, formed several years ago by reason of an ice dam, and which was removed by Mr. McAlpine under the direction of the Legislature. This is the whole of his evidence relating to this question, and proves nothing.

Captain Getty, sworn in 1856, expresses his opinion that piers at Albany would tend to the formation of sand bars, and describes the effect of a vessel grounding on a sandy bottom. He founds this opinion upon the known effect of the piers at Troy. This opinion amounts to nothing, for the nature of the bottom at Troy and Albany is widely different. He says that the bed of the river between Troy and Albany is mostly gravel, and at and below Albany quicksand. The survey at Albany, made by Mr. Gray, shows that Captain Getty mistakes the nature of the bottom at Albany, and his opinion as to the effect of the piers is therefore of little value, particularly when it is opposed by the opinions of several eminent engineers, who speak with full knowledge of the subject.

The evidence of Captain Hitchcock is no nearer the point, and contains nothing more than the expression of his opinion

adverse to the erection of a bridge, to which he admits he has a fixed and settled hostility.

Captain Edward Ellis also gives us the benefit of his opinion. He says the bottom near Albany is sandy, and that piers would tend to destroy navigation in a few years unless removed by dredging.

Captain Smalley, who commands the Troy dredging machine, furnishes his experience between Troy and Albany, and adds to it the weight of his opinion adverse to the bridge. He has known an island to form below Troy, by reason of the root of a tree lodging in the channel. He says that piers would damage the navigation by forming bars, and that they would be formed *between the piers*. His theory is at war with all others; for it is agreed that the effect of piers, if at all appreciable, is to accelerate the water between them and delve out the bottom and remove the sediment and form the bar below.

It is upon this evidence, of which I have given the substance, that the court is asked to determine, as a matter of absolute certainty, that the construction of any kind of pier in the channel of the Hudson, at Albany, will create sand bars to such an extent as that navigation will be essentially impeded. But one or two of these witnesses refer to the fact of sand bars ever having been formed in the vicinity of Albany under any circumstances, and they are trifling and inconsiderable. The evidence all relates to a condition of things above and below, but not at or very near Albany. All the witnesses (except Capt. Smalley) say that if bars form, it will be below, and not at or above the piers, and they cannot be formed unless the water-way is so much contracted as to materially increase the velocity of the water. It will be observed, also, that none of the witnesses describe or refer to the style of pier which they suppose will produce these results. The pier at the mouth of the Connecticut, referred to by Mr. Noyes, was large, and of diamond shape, and no at-

2685

tention was paid to its form, in order to avoid the consequences which it produced.

Yet this case is burthened with evidence, showing beyond dispute that whether a pier will or will not tend to the creation of sand bars depends almost entirely upon its size, form and manner of construction. The question does not, by any means, depend wholly upon the nature of the bed of the stream, but really upon the form and dimensions of the structure. Such is the uniform testimony of all the engineers who have given evidence in the case; and they state the result of actual experience, that in certain forms of piers, of moderate dimensions, there is no reasonable probability of the formation of bars, whatever may be the nature of the bottom. The witnesses upon whose evidence the complainants rely were mostly sworn in 1841, when this question was imperfectly understood. They all speak of larger and of a greater number of piers than is now contemplated as necessary, and express an opinion as to the effect of piers, not described, at a point in the river, with the nature of the bottom of which they are imperfectly acquainted or entirely misapprehend.

As opposed to this, we present evidence showing an entirely different state of facts from that upon which most of the complainants' evidence was given, and show, by the result of actual experiment, that the opinions they then expressed are unfounded. We now require a smaller size and a less number of piers than in 1841 would have been regarded absolutely necessary. We do not propose to contract the water-way to such an extent as sensibly to increase the velocity of the current, and hence there will be no disturbance or delving of the bottom between the piers, so as to create any deposit of unstable material below. Upon this point we have actual experiment and scientific calculation to show that in the channel at Albany the piers

proposed to be erected will not so contract the water-way as to increase the velocity of the water, in the vicinity of the piers, to any such extent as to cause a delving of the bottom or the consequent formation of any sand bars. It therefore seems to me that the proposition of the counsel is not sustained in any view of the evidence, and there is clearly no ground for asking the interference of this court in advance of what may be disclosed by actual experiment.

My learned friend has also, under his second proposition, referred to evidence to show that the channel of the river, in numerous places above and below Albany, is exceedingly narrow, uncertain and devious. There is no dispute but that at certain points, both above and below Albany, the statement is correct. Above Bath, and between that point and Troy, the channel is very narrow and devious, subject to continual changes, and affected and disturbed by various shore projections. The soil of the river is light and unstable, and the creation of sand bars at these points attends every considerable freshet.

It is undeniable that for many years the city of Troy has only maintained a feeble navigation of the river at various places above Albany by the constant use of its dredging machine, and the removal of the bars caused by every freshet. This, in a lesser degree, is true of some places in the channel below Albany, where the water-way is nearly as contracted as between Albany and Troy. In those places where the channel is narrow and devious, where shore projections tend to disturb the current, and where the sand is light and unstable, the same consequences follow. But your Honor will search in vain for any evidence in this case which shows that there ever was, by reason of any of the causes which affect the river above and below Albany, any formation of sand bars immediately in front of or near Albany, detrimental to the movements of the navigator. The reason is obvious. The channel is there wide and of uniform section for the

2687

distance of two miles—the force of the natural current has cleansed the bed of the river of all loose material—the bottom is now composed of a strata of stiff clay—and at or near the site of the bridge there is nothing in the condition of the river that renders probable any of the injurious consequences that affect navigation both above and below the city.

In the third subdivision of the gentleman's second general proposition of fact, evidence is referred to which, it is claimed, tends to show that the necessary effect of piers and abutments will be to facilitate the formation of ice dams, to multiply shoals, and embarrass and endanger navigation generally. These consequences, it is said, must also inevitably follow, from a consideration of the evidence descriptive of the bed of the stream.

So far as the erection of piers will facilitate the formation of ice dams, the evidence of the complainant rests in mere opinion. We oppose opinion and actual experiment to mere opinion in relation to this branch of the case. I believe that no witness, since this controversy began in 1814, has been able to point to a single instance of an ice dam being formed at or near Albany, within a distance of two miles, that has worked any change in the channel. During this lapse of time this occurrence has rested in vague apprehension merely, and it will so continue through all time whether the bridge is built or not.

In the narrow and crooked channel above and below Albany there is greater opportunity for ice to lodge and create dams than at or within two miles of Albany; and hence the deduction which the gentleman has sought to draw from the evidence referred to, in respect to the danger and effect of ice dams in other portions of the river, is a mere figment of the imagination, and bears no analogy to the condition of things at the site of the bridge. If, at the breaking up of the river, the ice can pass through crooked channels of one hundred and fifty feet width, it will generally be able to

pass Albany, where the channel is nine hundred feet. It might, we would suppose, pass between piers presenting two hundred feet clear space, the piers themselves operating as effectual ice-breakers. But our friends will have it, in spite of all experience and all the proof, that just at this point, where an ice dam has never formed, and where the condition of the channel renders such an occurrence wholly improbable, there is great danger that the city of Albany shall, in some day, be destroyed by a flood caused by the formation of a mammoth ice dam! The city of Albany is content to incur this risk, and our neighbors at Troy are under no obligation to needlessly distress themselves on our account.

We have in the case evidence to show that the erection of piers will not tend to facilitate the formation of ice dams, and it seems quite obvious that no such occurrence can happen at Albany. The piers themselves will be so formed as to operate as ice-breakers and thus obviate the very difficulty apprehended. The width and directness of the channel at Albany afford ample space for the passage of all ice that can come from above. We have evidence of the practical effect of piers for the support of railroad bridges across the Connecticut river, where the freshets are more extensive than in the Hudson. There are three bridges across the Connecticut at and near Springfield, with numerous piers for their support, and no ice dam has been formed by them. They rather "facilitate" the passage of ice than the formation of ice dams—the piers acting as ice-breakers. This is shown by the deposition of Mr. Johnson.

The reason why no ice dam ever has been or ever can be formed at Albany is entirely manifest. All the ice that goes down the Hudson from above Troy passes over the state dam and between the piers of the Troy bridge, and is necessarily broken in pieces. That which comes from the Mohawk enters the Hudson in the same condition, as it has to pass over the

2687

Cohoes falls, and through the piers of various bridges near its junction with the Hudson. It then passes down the river from Troy through spaces scarcely exceeding one hundred and fifty feet wide, following a crooked channel all the way from Troy to Albany. The argument then is, that the ice which passes over the Cohoes falls and between the piers of several bridges on the Mohawk—over the Troy dam and between the piers of the Troy bridge—and finds its way without material difficulty through spaces of one hundred and fifty feet, the moment that it reaches the wide water-way of nine hundred feet, opposite Albany, in a true and uniform current, it meets with obstruction, and if you place an ice-breaker in the channel there, the capital of the state is threatened with immediate destruction! I do not comprehend the force of this argument, nor feel oppressed with the weight of these opinions. As no such occurrence has happened there since the beginning of the world, I see no ground for apprehending that it will happen so long as the waters of the Hudson shall continue to flow.

In the third place, reference is made to the evidence in the case, on the part of the complainant, showing the extent and nature of the commerce and navigation of Troy, and, as the printed point expresses it, "some of their incidents." In the form in which the question has been presented the commerce of Troy is greatly magnified; and I shall undertake to show that the statement of the extent of this commerce, and the number of passages claimed to be necessary to carry it, as printed in the complainants' points, is to a great degree fanciful and imaginary. This claim to extensive commerce at Troy is founded upon very little evidence that approaches accuracy, but proceeds upon swollen estimates of interested witnesses, made for the purpose of magnifying the importance of Troy and inflating its commerce. It was a part of the machinery of this case, before the Legislature, to overrate the commercial importance of Troy, and the effort, it seems, is to

be continued in the courts. A careful examination of the evidence, and the extensive claim made upon it, will explode the pretence, and as it presents the most important question of fact involved in this case, I propose to give it particular attention.

All that is said relating to the extent of the commerce of West Troy will be found in the evidence of Seneca Silliman, beginning on page 29 of the volume handed up by the defendant, and at folio 79 of the complainants' case, where he says: "I have made a statement of the number of vessels owned at West Troy: total masted vessels 21, tonnage 2325; trips down and back, 18 per year for each vessel; 240 days is calculated to be the season of navigation, making 756 passages for the masted vessels."

I may as well state here that they have adopted 240 days as the whole season of navigation, and assume that the vessels are during all that period in constant and active service. It is, however, shown in the case that ordinarily the business season commences with the opening of the canal, about the first of May, and closes about the first of December; so that, in adopting 240 days as the season of navigation, they add thirty days more to the business season than ever in fact exists. This excess runs through all the calculations.

Mr. Sillman proceeds to state that the "freight barges owned at West Troy are 39, and will carry 9475 tons; make 20 trips, 40 passages, and in all for the season 1560. One steamboat runs regularly from Troy to New-York, leaves West Troy every Sunday morning; she generally makes a few trips before the canal opens. She makes 30 trips, 60 passages. Small steamboats between Albany and Troy, 14 that run regularly; they make 480 trips each, or 960 passages each, or total passages 13,460."

The 14 steamboats referred to are the tug boats that are owned at Albany, and are employed in towing the vessels, that navigate the river above Albany, up and down. Two

2691

trips are allowed for each of these steamboats every day during the entire season of 240 days, by which estimate the number of passages is greatly increased beyond the actual fact.

It is further said that the "total tonnage of vessels owned by lumber dealers at Williamsburgh, New-York, Brooklyn and New Jersey, running to Troy—2950—they make 756 passages."

These vessels, it is stated, *run to Troy*, and yet are embraced in the West Troy tonnage, and then again included in the Troy estimate, and to that extent duplicating the tonnage above Albany.

This witness then proceeds to say that he estimates the total amount of freight carried by all vessels included in his statement at 450,000 tons, and this includes the freight carried by the foreign vessels enumerated, and which it is stated run to Troy. We then have the opinion of the witness that these vessels could carry more than they do in fact, but that they are not fully loaded each way. He then says that there are other vessels which ply between West Troy and southern ports, some with loads and some light, but the kind of vessels, number, etc., is not given. It is further said that these vessels carry, on the average, about 125 tons, *and some of them load at Albany.* The witness then sums up by saying that the vessels included in the schedule would require a draw at Albany to be opened 16,572 times per season, or 62 times per day (of 24 hours), calling the season 240 days.

At the bottom of page 34 this witness says that he never saw but one masted vessel beat up from Albany to Troy; that the masted vessels and barges are towed up and down generally by the small steamers, and that the steamboats and vessels they have in tow make the same passage; that he has towed down at one time seven masted vessels in a tow; that the average number in a tow at high water is three, *but in calculating the number of openings of the draw, it is for each vessel when there are several in a tow.*

It is thus seen, by referring to the statements in connection with this evidence, that the caculation is made upon the supposition that each and every one of the several vessels that are owned at or ever visit West Troy, including the steamboats towing them, are to have the draw at Albany opened for their accommodation, although a half a dozen would ordinarily pass at one and the same opening. Then, by enlarging the business season to about 240 days—at least a month beyond the ordinary limits—the number of passages at the draw is multiplied to the extent stated for the accommodation of the commerce of West Troy. It needs no comment to show the delusive nature of this calculation, nor to show that it was got up for the evident purpose of magnifying the difficulties of a draw-bridge at Albany. It is simply absurd to assume that a draw must be opened for every single vessel that visits Troy, when there is clear evidence that two or more vessels usually pass in tow of the same steamer. So, if we assume that the steamer tows two vessels at each trip, which is the lowest figure, this would reduce the number of draw openings to one-third their computation, or to about 20 times in 24 hours, or to less than one opening per hour, and it is very clear that a steamer with two vessels in tow could readily pass the draw at one single opening.

On page 33 of our volume is an aggregate statement of the result of the calculations of this witness upon the enlarged basis disclosed by him, bringing the grand total, as before stated, at 16,572 passages per season, and it seems to me very manifest that this method of calculation brings the number of draw openings for the accommodation of the commerce of West Troy to a number at least four times greater than the facts show will be required.

Then, sir, the extent of the commerce of Troy is presented upon the same liberal principle of computation; and it is evident that the computation, in respect to both places, was got up by previous concert, for no accident could have produced two calculations so entirely harmonious in error.

2693

On page 37 of the defendant's volume appears Mr. Haz ard's inventory of the commercial importance of Troy. He states that he has made an estimate of the freight and tonnage of the vessels owned at Troy, with the following result:

Barges, 35; total tonnage, 12,590; 20 trips each for the season, 40 passages; and in all, 1400 passages for 240 days of navigation.

Masted vessels, 3; tonnage, 395; 18 trips, or 36 passages each, and 108 in all for the season.

Barges and propellers, 12—craft belonging to the Troy and Philadelphia line—4 propellers and 8 barges; tonnage, 2,440 tons; 16 trips, 32 passages each; 384 passages in all for the season; 262 shipments from Troy for Boston and eastern ports; 30,680 tons of freight shipped, and 524 passages in all for the season.

Steamboats—2 passenger steamboats, 200 tons each—400 for both; carry freight and passengers, and run to New-York 168 trips for both and 336 passages during the season.

Foreign Vessels.—"We estimate," he says, "foreign vessels, other than above mentioned, 100,000 tons, which we consider a low estimate."

His estimate of the amount of freight carried is as follows:

	Tons.
"Amount of freight carried by Troy barges and sail craft belonging to Troy,	519,400
By Philadelphia line,	78,080
Tonnage of vessels:	
By Troy, Boston and Eastern line,	30,680
By passenger steamboats,	67,200
Total,	795,360"

This is the estimate of the commerce of Troy. Upon page 40, there is a recapitulation of the whole estimate, in

which the whole number of passages required is put down at 3,418. It will be seen that this statement is made upon the same principle as that of West Troy, and that these barges and masted vessels are towed in the same manner and by the same steamtugs that are referred to in the statement respecting the business of West Troy, and this Troy statement is subjected to the same inflation that distinguishes its neighbor. Being aggregated, the general result is some four or five times greater than the real truth. They calculate that the draw must open for each individual vessel, whether steamtug, barge, sloop or schooner, and yet swear that these vessels never go alone, but from three to seven pass up or down together, depending upon the stage of the water on the bars above Albany. It is entirely clear that the whole 13,440 passages for the small steamtugs should be stricken out, for they carry no freight, and pass up or down, as a general thing, only when they have one or more other vessels in tow. With this deduction, the whole passages claimed for the Troy and West Troy commerce, is 6,550. For the season of navigation, as they estimate it, this makes 27 passages a day, or a fraction over one passage per hour, on the average. With this correction, the statement would approach somewhere near the fact, and might perhaps be safely relied upon.

Again: with respect to the tonnage and business of Troy, it is claimed that it is largely increasing, and must of necessity be seriously affected by a draw-bridge. This claim is founded upon the same unsubstantial and inflated estimates, and will rapidly disappear as we examine it.

In Mr. Hazard's statement (on page 40, defendant's volume), after naming 35 barges, with a tonnage of 12,950 tons, and the masted vessels, with those of the Philadelphia line, he puts down the number of Troy, Boston and eastern vessels at 262, with a tonnage 30,680 tons. How he arrives at this result is unexplained, except that one gentleman engaged in the

eastern trade testifies that during the season of 1855 he made 240 shipments from his establishment to parties living down east, and upon this Mr. Hazard puts 262 vessels, as though that number was actually engaged in this trade, and then adds 30,680 tons for their tonnage. In the calculation of the tonnage of vessels it makes a very wide difference in the result whether you say you have 262 in actual service, with an aggregate tonnage of 30,680 tons, or whether you have ten vessels that during a season's navigation carry that number of tons freight. As the number of these vessels is not given, no estimate of their tonnage can be made, and it is clearly absurd to say that the aggregate tons of freight carried during a season represents the tonnage of the vessels employed in that service. By way of climax to this method of computing the tonnage of Troy, Mr. Hazard proceeds to add for the tonnage of "foreign vessels coming here," 100,000 tons!—making the tonnage of the vessels owned at and trading with Troy, in 1855, at the respectable figure of 146,505 tons! At an average of 125 tons burthen per vessel, this brings up the number of vessels trading with and owned at Troy in 1855 to 1172! The whole number owned at Troy is less than 60! leaving over 1100 foreign vessels trading with Troy; or about five times more than is even claimed, and at least ten times more in number than in fact ever visit the city of Troy in any one season. Yet this monstrous statement is gravely presented as containing accurate information concerning the extent of the commerce of Troy.

Mr. Hazard states, in cross-examination, that canal freight is transhipped at Troy and taken away in barges, and makes up one-third of their tonnage; that he does not know the number of vessels engaged in the Troy and eastern line, and having no knowledge on the subject he puts the number at 262, carrying a burthen of 30,680 tons, and sums it all up with 100,000 tons as the burthen of the foreign vessels visiting Troy.

The absurdity of all such estimates and calculations is most manifest from a very slight examination. There is no doubt of the fact, as it is conceded, that the number of masted vessels sailing to the city of Troy has largely decreased since 1845, and has been steadily decreasing for several years past.

It is also undisputed that nearly all the foreign trade of Troy is conducted in sailing vessels; yet the claim on the part of Troy is, our foreign trade is carried on in sailing vessels. Their number has largely decreased since 1845, and is constantly decreasing; but, nevertheless, our foreign commerce is rapidly and constantly increasing. With this ratio in the decrease of vessels and the increase of commerce, a draw-bridge will be of little moment, for by and by the large commercial interests of Troy will flourish without the aid of vessels of any kind.

To show the progress made in commerce at Troy, I refer to evidence on that subject in 1845. It will be found on page 149 of our volume, in a document accompanying "a remonstrance of the common council of Troy against the erection of a bridge at Albany," presented to the Legislature. This document presents a detailed statement of all the vessels owned at or running to Troy in 1845, with their tonnage. We first have 8 steam passage boats owned at and running to Troy, with a tonnage of 4,028 tons. Then a list of 10 steam towing boats owned in part and wholly, and runuing to Troy regularly during the season of navigation, carrying 3,125 tons. Then a list of 5 steamboats owned at Albany and below, and very frequently running to Troy during the navigable season, carrying 655 tons. Then comes 29 freight barges, owned at Troy and running during the season, tonnage 7,256 tons. Then a list of 20 foreign tow barges, trading to Troy during the preceding season, tonnage 2,658 tons. Then we have a list of 74 masted vessels owned and belonging above Albany, including three barges at Lansingburgh, with a total tonnage of 6,253 tons.

It is stated on page 154 that the tonnage of all these 74 vessels is put down at custom-house measurement, which falls one-quarter short of their actual burthen. The inference is, that the statement of tonnage there presented was at least one-quarter below its actual amount. In 1845 the statements were far below the true amount, and in 1856 very far above. In contrast with the 74 masted vessels in 1845, owned above Albany, they now present 24, showing a decrease of 50. In this inventory of Troy commerce in 1845, there follows a detailed "list of foreign vessels trading to Troy the last season, their names and tonnage," and the total number of such vessels appearing in the inventory is 256, with a total tonnage of 24,716 tons. This was the foreign commerce in 1845.

It clearly appears that since 1845 there has been a continual decrease of sail vessels of all classes. The 74 vessels owned at Troy and West Troy in 1845 are now reduced to 24; and there has also been, as is agreed, a large decrease of the number of foreign masted vessels. Yet notwithstanding this pregnant fact, Mr. Hazard puts down the foreign tonnage of Troy in 1856 at 100,000 tons, against 24,716 tons in 1845! so that the theory seems to be, that the fewer the vessels which navigate the river above Albany, the greater is the commerce of Troy — the fewer vessels they have engaged in foreign trade, the greater is the amount of their tonnage!

In this connection I wish to call attention to another fact: Mr. Silliman estimates the total movement of West Troy freight at 450,000 tons. Mr. Hazard gives that of Troy at 795,360 tons, making an aggregate for both of 1,245,360 tons. In 1854 the total amount of freight coming to tide water on all the canals of the state was only 1,696,558 tons, so that by these estimates the freight of Troy and West Troy alone, with the immaterial difference of a few hundred thousand tons, is equal to the whole commerce of all the

canals of the state; showing that the importance of the canals in the carrying trade of the state has been very much over-rated, or that Troy commerce, in comparison with it, has been greatly under-rated, unless, indeed, it is apparent that the estimate presented of the extent of the present commerce of Troy is very extensively inflated for the purposes of this controversy.

Following the counsel for the complainants, we come to the fourth subdivision of his third proposition of fact, in which it is claimed that three-fourths of the transportation upon the New-York canals enters the Hudson river above Albany, and that very large benefits accrue to those engaged in such transportation by entering the river at Troy rather than at Albany.

By this reference it is proposed further to magnify the importance of Troy and the free navigation of the river at and above Albany; but I am unable to perceive the force of this position when urged in opposition to a bridge at Albany. It is shown that a portion of the canal freights is transhipped at Troy into barges and then passes down the river. The residue of the canal freight does not break bulk but enters the river and goes on to New-York in the same canal boats that bring it to tide-water. These boats are towed down by the steamtugs, with the barges and sail vessels. The bridge we are authorized to erect is to be so far elevated above the water as to allow canal boats and barges, without masts, to pass under it without requiring the opening of the draw. These canal boats are towed down the canals, through locks 15 feet wide, and under bridges 12 feet above the water; but the argument is, that when they reach Troy and float upon the bosom of the Hudson they begin to expand, and by the time they arrive at Albany they become so enlarged that it is impossible for them to pass between piers 200 feet apart, or under a bridge elevated at least 20 feet above common tide!

2699

Now, in respect to the statements here presented as to the extent of the present commerce of Troy, I do not intend to urge that they are wholly without foundation; but that they are greatly exaggerated, and are, for all the purposes of this motion, wholly unreliable. I may concede that the business of Troy is quite respectable; but I deny that it rivals the whole carrying trade of the state, or that its vessels fill up the entire channel of the Hudson. So far as its mere local traffic is concerned, it may now be equal to what it was in 1845, or it may be greater, although the number of its vessels engaged has largely decreased. But in respect to what is termed the foreign trade of Troy, conducted mainly in sail vessels carrying a coasting license, the fact is undeniable that the number of such vessels trading with Troy has largely decreased since 1845; and it is predicted that at no distant day very few of that species of craft will be seen upon the river above Albany.

Upon such facts I am unable to perceive how the foreign trade of Troy has increased since 1845, or is constantly increasing, unless, indeed, it is made clear that this kind of commerce increases in the same ratio that the vessels engaged in it diminish.

[The court here adjourned to Friday morning, Nov. 21st, 1856, at 10 o'clock.]

FRIDAY, *November* 21, 1856.

The court sat at 10 o'clock, when Mr. REYNOLDS resumed his argument:

I desire, may it please your Honor, to make a few more comments upon the statements in the printed papers concerning the extent of the commerce of Troy; because the case on this ground has been strongly pressed on the other side, and we regard it as a material question of fact, in respect to which there should be no misunderstanding. I had shown the other day the nature of the computations relied upon by

the complainants as to the extent of this commerce, the number and kind of vessels engaged in it, and the number of times it was claimed that the draw of a bridge should be opened for its accommodation. I had also shown that the number of draw openings was calculated upon the most enlarged plan in every respect, and upon the assumption that the draw must be opened for the separate passage up and down of every vessel that ever sailed above Albany.

I now propose to consider the question in the aspect presented in the third subdivision of the fourth general proposition of fact submitted by the counsel for the complainants in which it is claimed that, to accommodate the vessels trading with the city of Troy, the draw of a bridge must be opened once in every five minutes, which is equivalent to having it constantly open.

In order to see to what result this proposition necessarily leads us, let it be assumed that a vessel engaged in commerce with Troy passes Albany on the average every five minutes. This makes 12 passages per hour, or 288 per day; with 240 days' navigation, as the gentlemen assume, it gives us 69,120 passages of vessels for the season. The case shows that the average burthen of the vessels owned at and trading with Troy is at least 200 tons. This is a low estimate, for the Troy barges carry on the average 360 tons. Taking the average at 200 tons, and multiplying by the number of passages claimed, we reach a result showing that the commerce of Troy during a season will amount to 13,824,000 tons! or an amount about twelve times greater than anybody has yet claimed for it. If we put the average burthen of the vessels at 100 tons, the result is 6,912,000 tons, or about six times more than is claimed, or if half the vessels go unladen the result is the same. It therefore must follow that the statement that vessels pass on the average once in five minutes is a mere exaggeration.

Again: if we take the statement made by Mr. Silliman as to the West Troy commerce, and of Mr. Hazard as to the

2781

commerce of Troy, we shall also reach a result showing the entire inaccuracy of all these calculations. For the accommodation of West Troy vessels Mr. Silliman makes 16,572 passages necessary. Mr. Hazard claims that to accommodate Troy vessels a draw must be opened 3,418 times, making an aggregate of 19,990 passages per season. With this number of passages, vessels of the burthen of 200 tons each would carry, during a season, 3,998,000 tons; while the whole commerce of both places is not claimed to exceed 1,200,000 tons per season. Upon this computation of the number of passages, the commerce of Troy is made a little less than 4,000,000 of tons per annum, or an amount greater than the entire tonnage of all the canals of the state both ways. If one-half of the vessels requiring passage through a draw were unladen, the result is that this commerce is equal to 1,999,000 tons, or greater by several hundred thousand tons than all the tonnage that reached tide water from all the canals of the state in the year 1854!

Again: if we examine these computations in another aspect, the result is equally disastrous to their accuracy. The whole West Troy business in 1855 is estimated by Mr. Silliman at 450,000 tons. Mr. Hazard says the business of Troy for the same time was equal to 795,360 tons. These make an aggregate of 1,245,360 tons. Six thousand two hundred and twenty-six vessels, of 200 tons burthen each, would carry this amount of freight in one day. For 240 days' navigation, 26 passages per day would be sufficient, or about one vessel per hour instead of one every five minutes. It seems to me that these computations explode the entire claim made upon the other side, founded upon the statements and estimates of Messrs. Hazard and Silliman. Vessels to and from Troy do not pass any point in the river once in five minutes, nor is the river constantly crowded with craft groaning under the weight of this extensive commerce. If all these vessels were passed singly, 26 openings of a draw during

24 hours would be sufficient for the accommodation of the commerce of Troy and West Troy in 1855. But the fact is, these vessels seldom, if ever, pass singly. A number are towed along together. In the higher stages of water, from three to seven; in the ordinary summer water, two. If we take the lowest figure, and say that on the average of the whole season's navigation two vessels go along together in the tow of a steamtug, we have only 13 openings of the draw in 24 hours, or one opening in a little less than two hours on the average. And this number of openings would be amply sufficient to accommodate all the commerce that is claimed for both places, even upon the liberal principle upon which that claim is here made.

I am, therefore, after a particular examination of the various estimates, unable to subscribe to the accuracy of the statements of Mr. Silliman or Mr. Hazard, or of the counsel for the complainants, either as to the number of passages or the extent of the tonnage of Troy and West Troy. Nor do I comprehend the force or accuracy of the statement of counsel, that this commerce is so extensive as to require the draw of a bridge to be constantly open for its passage, and that it continually fills the whole navigable channel of the river. Nor am I able to perceive why it is that this commerce of Troy, which gets along very well through the difficult channels above Bath, not exceeding 150 feet wide, finds it distressing to pass the city of Albany through a clear water-way of 900 feet, in a channel direct and uniform.

In all I have said upon this part of the plaintiffs' case, I repeat that I do not wish to be understood as underrating the importance of Troy or its commerce. But I do mean to insist that in this case the effort has been steady and systematic to greatly overrate the magnitude and importance of the city of Troy in every respect, and then to urge that this great city and its extensive commerce cannot, by any possibility, pass through a bridge at Albany. I may admit

that the business of Troy is respectable in its extent, but it is not beyond the reach of actual computation. And when this court is asked to stay the progress of a measure of public importance to the people of the state, and nullify an act of the Legislature — and when the exercise of the power invoked may depend upon a question so essential as the magnitude of the commercial interests to be affected by the erection of a bridge at Albany — I say the counsel for the complainants was called upon to show the nature and extent of this commerce with particular accuracy. Nobody can doubt but that it was in the power of Mr. Silliman, one of the complainants, a resident of Troy, and for forty years connected with its commercial interests, to have furnished this court with a particular and accurate inventory of the amount of its tonnage, its nature, and the number and kind of vessels employed in its transportation. Troy is a port of delivery and has a custom-house, with a collector and surveyor of the port. There, at least, the "foreign vessels," sailing under the protection of a coasting license, will be registered, with the time of arrival and departure, and the amount of their tonnage; so that the number of such vessels visiting Troy in any one season, with all the particulars showing the extent of the "foreign trade," could have been readily ascertained; and yet with all these facilities at command, the counsel for Troy present their case without showing, anywhere, the number of vessels owned at or visiting Troy, employed in the coasting trade, or their tonnage, and with nothing but mere estimates made by gentlemen who admit they have no accurate or reliable knowledge upon the subject.

I submit to your Honor that, when the city of Troy comes here to invoke the exercise of the extraordinary power of this court to restrain the erection of this bridge, and upon so material a question as the extent of the commerce to be affected, the facts being within its knowledge and capable of

being made definite and certain, the presentation of the case in its present unsatisfactory aspect is a pregnant fact to show that an accurate inventory of Trojan commerce, foreign and domestic, was not suited to the success of the present experiment. They find it easier to declaim about their extensive commerce than to show by facts and figures that it actually exists. The learned counsel proceeds by stating "that the foreign trade to Troy and West Troy has been for years and is steadily increasing." It is said also that the river trade was formerly conducted mostly in sailing vessels, but of late years "masted barges" and tows are, to a great extent, substituted. So it is argued that, although the number of masted vessels sailing to Troy and West Troy may have decreased since 1845, the number of "masted barges" has more than proportionably increased.

I have already endeavored to show that inasmuch as the foreign commerce of Troy was carried mainly in sailing vessels, and as the number of such vessels had largely decreased, the opinions of witnesses, that the foreign trade of Troy was constantly increasing, were not entitled to much consideration. In order, however, to swell the number of masted vessels, the gentleman has introduced the "masted barges" as a substitute, and they are paraded through the case as if they had masts to aid in the operations of navigation. This is an entire delusion, as is shown by the evidence of Mr. Silliman on page 35 of our volume. He says: "There are not so many masted vessels running to West Troy as in 1841. I include all the foreign masted vessels. The foreign trade has increased. Our own vessels have decreased. Including 'masted barges,' there are more running to West Troy now than in 1841. The spars to the barges are stationary. They are an important part of the vessels. The masts to barges are not used for sailing the vessels."

Judge NELSON. What were they for?

Mr. REYNOLDS. They are merely derricks, and employed in loading and unloading the vessel. They have no connection with the movement of the barge. I have a reference to the testimony of a witness who says these masts to barges are used as derricks simply. Hence it will be seen that these derricks are pressed into service to make up for the deficiency in sailing vessels; but they are, after all, barges, having no other way of going up and down the river than in the tow of a steamtug. It is conceded that sailing vessels have decreased since 1844, and it would seem to follow that the foreign trade conducted in such vessels must also have decreased. And it is incorrect to say, in spite of such facts, that this foreign trade is constantly increasing.

It has already been shown, from the statements introduced upon the other side, that in 1844 the number of foreign sailing vessels trading with Troy was 256, and that 74 were then owned there. This gives the aggregate of sailing vessels engaged with Troy in 1844, at 330. In 1856 the number of sailing vessels owned at Troy or West Troy is but 24. They do not give us the number of foreign vessels visiting Troy in 1856. No witness even gives an estimate. It is agreed that the number has largely decreased since 1844, but we have no accurate means of making the comparison. We have, however, enough to show that the opinions expressed as to the increase of the foreign trade of Troy, are in conflict with facts and wholly without foundation. This trade, as it appears from the case, is much less than in former years. If it has, in fact, increased largely, it is strange that the diligent agents of the city of Troy have failed to make it apparent.

The counsel for the complainants next avers that the city of Troy has, in some way, acquired the guardianship of the canal interests of the state, and that it is necessary to their protection that no bridge shall be erected at Albany. From the judgment of the Legislature they appeal to this

court. And it is stated that three-fourths of the canal transportation enters the river above Albany; that there are a much greater number of lockages at Troy than at Albany; that in 1854, of the 1,696,558 tons which came to tide waters, 1,000,000 of tons were locked into the river at West Troy. It is then averred that the cost of navigating a boat by canal from Troy to Albany is $12.05, and by the river $5; and that in 1854 the difference in favor of river navigation was $86,000.

I do not see how any such calculation, whether accurate or not, is material to the question here. Nor has any statute of this state committed the protection of the navigation of the Erie canal, or the business interests connected with it, to the corporation of Troy. The same Legislature that authorized the erection of a bridge at Albany, still guards the canals of this state, and they are altogether beyond the jurisdiction of this court or of any branch of the government of the United States. Canal boats do not sail under a coasting license, and their movements are not regulated by laws of Congress. The state Legislature may "regulate commerce" on the canals. It may close the West Troy side cut, and require canal boats to enter the river at Albany and pay into the treasury the tolls between Troy and Albany, and this court could not interfere with such a regulation. No canal boats would ever enter the river at Troy, except the Legislature had authorized it. Whether this shall be continued or not depends upon the will of the Legislature, whose action the city of Troy is here to assail and annihilate. If the fact that the canal commerce, which enters the river at Troy, presents an objection to the erection of a bridge at Albany, the Legislature may at any moment remove the objection by closing the side cut at West Troy, and thus send on the canal freights into the Hudson at Albany, below the bridge we are to erect. May not the Legislature do this? and if done can this court interfere? If the Legislature authorize

a bridge which will impede the transit of canal boats, even on the Hudson, is any law of Congress violated? Have canal boats the protection of any coasting license? Are they not wholly and exclusively subject, in all respects, to state legislation, as vessels engaged in mere local and internal traffic? It is most certainly so; and it is a strange argument to urge here that the state Legislature may not, even in opposition to the wishes of the city of Troy, assume to regulate and advance or impede its canal traffic at pleasure, and terminate its canals at Troy or Albany as it may deem most advisable.

But there is nothing in the argument presented upon this branch of the complainants' case. It is shown in the evidence that a portion of the canal freight is transhipped into barges at Troy, and comprises about one-third of Troy commerce. All freight from the canal entering the river, which is not transhipped, passes on to New-York, in the tow of steamers, without breaking bulk, and may quite as easily pass under a bridge at Albany as under those which span the canal all the way between Albany and Buffalo.

The very argument now presented by the gentleman was urged with great zeal before the Legislature of the state as the only rightful guardians of the interests of the canals. It was there said that the erection of a bridge at Albany would tend to increase and perpetuate the power of railroad corporations, to the great diminution of the canal revenue, and the Legislature were implored to preserve the canals from such ruinous competition. The Legislature did not see the force of the argument, and an appeal from its decision is made in this form to this court, where it is entitled to no consideration whatever.

It seems to me very idle to urge that the erection of a bridge at Albany, with or without draws, can in any way impede the progress of a canal boat. They may all pass under the bridge and between the piers without hindrance,

in the tow of the steamtugs employed between Troy and Albany, and it is not perceived how the interests of the canals of the state are to be in any way injuriously affected.

It is said that when the enlargement of the Erie canal is completed, the business of the canals will be largely increased. This may be true. But, with the enlargement, the capacity of canal boats will also be increased. The ordinary burthen of canal boats is now about 80 tons; with the enlargement completed, these boats will be increased in capacity to 240 tons burthen, so that with one-third the number of passages they can carry the same amount of freight as at present, and with the same number of passages they will carry three times the amount of freight; so that if the canal be enlarged, as it will no doubt be, a bridge at Albany or elsewhere will present no more impediment than now to the movement of canal boats, even if the business be largely increased.

It is an undeniable fact, that the trade of the canals of the state has not been increased to any considerable extent for some years past. This is shown by the comparative estimates of canal tonnage annually submitted to the Legislature. An elaborate examination of the question is also made in the report of the Auditor of the Canal Department for the year 1855. By reference to that document it will be seen that the *decrease* of canal tonnage, and the *increase* of that carried by railroad, was so alarming that, in order to maintain the canal revenues, the Auditor recommended to the Legislature the imposition of tolls upon the lines of railroad that came in competition with the canals. By this document a great fact in the history of the internal commerce of the state is established: that by the ordinary and necessary course of things —from the great speed, safety and convenience of railroad transit—large portions of the freight passing east and west finds its way in the railroad car, in preference to the canal boat. However it may be with the comparative statements

of canal tonnage, from year to year, it is certain that the traffic by means of railroads is rapidly increasing, and must continne to increase. The canal and river navigation can be maintained for but little over half the year. For the residue they are entirely useless. The railroad, on the contrary, is not closed by ice, but its cars travel with equal facility in mid-winter as in midsummer. It connects remote places, between which canals and rivers do not and can never exist, and opens commercial facilities which no other means of transportation can accommodate. It is not wonderful, therefore, that the railroad traffic is largely increasing; nor is it strange that an enlightened Legislature should respect the almost universal demand made upon it for the extension of facilities absolutely necessary to the accommodation of the immense internal traffic of the state.

It is said also, by the counsel for the complainants, that the erection of a bridge at Albany will destroy the competition between Troy and Albany in the carrying trade, and by securing the monopoly to Albany, increase the expenses of freight transportation. How such a result is to happen is not explained, and if to happen, the powers of this court to interfere to preserve the competition is not shown. But it is strange that the enormous, vigorous and healthy commerce of Troy, which can easily pass through a channel of 150 feet wide, is to be annihilated at once if it is required to pass Albany through a space of 300 feet, or that any slight impediment in any portion of the river is to insure its destruction. It will, I think, hardly be pretended that the steamboats and barges laden with freight, which depart from the port of Troy for New-York, expect to perform the journey and return to Troy in a precise moment of time. They are often delayed by adverse winds, or upon some of the numerous sandbars above Bath, or at the overslaugh, for hours and days, and the commerce of Troy still exists. Yet, it is argued, if a Troy vessel, laden or unladen, is, by means of a draw-

bridge at Albany, detained for the space of five minutes, then "Troy is no more," and her extensive commerce, that is here made to rival that of all the canals of this state, ceases to exist.

It might possibly happen that a feeble and sickly commerce, which barely existed of itself, might greatly suffer from an impediment of even a very light character; but it cannot be for a moment admitted that a commerce so extensive, important, grand and magnificent as that of the city of Troy can be seriously affected, even if it should occur that on some windy day or stormy night one or more of its barges should be detained for a few minutes at Albany in passing a draw. A commerce that increases as the number of vessels engaged in it diminish—that can pass through a crooked channel of 150 feet wide with greater facility than where it reaches 900 feet width—that rides with ease and safety over sandbars that the constant service of a dredging machine, under command of Capt. Smalley, can scarcely remove—has nothing to apprehend from any erection at Albany which has been authorized by the Legislature of this state.

But if all the dreadful consequences predicted are to follow the erection of the bridge, I should be glad to know upon what principle this court is to interfere in the equitable adjustment of such a controversy. Your Honor may interfere by injunction, if it clearly appears that we are to violate any law of Congress or the Constitution of the United States. You are now invited to balance the claims of rival cities, competing for internal trade—to consider the effect of this measure upon particular business interests, local in their character, and nicely adjust the equities, so that one city shall gain no advantage of the other. I have greatly mistaken the object of the mission of this court if such considerations are to influence its judicial action, and I venture to say that this is the first occasion when its aid has

been invoked upon any such grounds as those to which I have adverted.

In the next place we are referred to evidence which, it is claimed, shows the difficulties and dangers of passing draws in general, and the impossibility of conducting the commerce passing above Albany through the draws required by the act under which we proceed. The opinions and experience of business men and navigators are relied upon to prove that a successful draw-bridge at Albany is an impossibility. Most of this evidence was given in 1841—one witness gave evidence upon the subject in 1854, and several in 1856. I shall not detain the court by much reference to this evidence. I must, however, say that of all the evidence given in 1841, 1854 and 1856, there is not a single witness who gives any opinion with reference to a bridge having a draw of the size required in this instance; nor has any business man or navigator had experience in respect to such a draw. No witness swears that draws of the width required in this case, properly managed, would not accommodate the whole commerce of Troy and West Troy without difficulty.

Your Honor will observe that in 1841, when the principal portion of the testimony read was taken, no draw then existed in this country or in England which exceeded 70 feet in width; and in most of the draw-bridges then known, the clear space of the draw was less than 50 feet. And the opinions given as to the effect of draw-bridges upon commerce were with respect to such draws; and all the experience of navigators had been with respect to draws between 25 and 50 feet in the clear. By the act under which we proceed, each of the two draws required are more than twice the width of the largest draw known in the world in 1841, and more than four times the width of those then best known and most commonly in use. The opinions relied on were, some of them, given with reference to the ten or eleven draws over the Charles river, at Boston, none of which

exceed 30 feet in width, and through which 50 vessels a day are, without difficulty, navigated. Others speak with respect to the draw-bridges on the Hackensack, the Passaic, the Schuylkill, the Potomac at Georgetown, and the Hudson at Troy, and various other places. The width of the draw at Troy was originally 50 feet; it is now 66. The draw on the Potomac is 60 feet wide; over the Schuylkill, below Philadelphia, it is less; and on the Passaic and Hackensack, the widest draw does not exceed 35 feet, clear space. All the navigators who speak of the inconvenience of draw-bridges, have reference to bridges and draws of the description before stated. None of these draws are constructed or operated in accordance with modern improvements. They are badly constructed and unskilfully manœuvred. Vessels are obliged, in many instances, to warp through them; and this operation is always attended with more or less delay and inconvenience. There is no comparison between the bridges to which the complainants' evidence refers and those of modern construction. Great progress and improvement have of late years been made in this kind of structures. Draw-bridges are now very numerous in this country and in Europe. There is scarcely any navigable river in this country that is not, at some point, spanned by a draw-bridge. They have become necessary for the accommodation of land commerce, and constant improvement has been made in their manner of construction and mode of operation. We have depositions here upon our part from gentlemen connected with the draw-bridges at Chicago, showing that 150 vessels, of all classes, pass the draws in a single day without material delay. Nine-tenths of the immense commerce of Chicago passes through, at least, three draw-bridges over the Chicago river without substantial impediment. These are facts—the result of actual experience, and not mere opinions. They are the result of the experience and observation of practical men as to the operation and effect of draw-

2713

bridges of much less span than that to be erected at Albany, and they concern a commerce vastly more extensive than is even claimed for that of the city of Troy. The present draws on the Chicago river do not exceed 60 or 70 feet in width. A draw-bridge is now building near the mouth of the river, with draws having a clear space of 96 feet, through which the entire commerce of Chicago must pass. And such a structure there does not, in the opinion of those competent to judge, threaten the commercial interests of Chicago with destruction. When the gentleman urges, therefore, that we must not rely upon the opinions of engineers as to the effect of draw-bridges upon navigation, we can answer that we do not rest our case alone upon the opinions of any class of men. We point to the result of the practical experience of intelligent gentlemen who have seen the effect of draw-bridges upon the commerce of one of the greatest cities of the west.

In addition, we have proof of the practical operation of the bridge over the Mississippi at Rock Island, completed within a year, and which has the largest draw known in the world. The clear space offered by the draw, upon each side of a centre pier, is from 120 to 125 feet. We have the evidence of those who constructed this bridge and of those who have observed its operation and effect, and who manage the draw, and they all concur in saying that in no single instance has it in any degree impeded the navigation upon the river. It is true that the commerce of the Mississippi at that point is not so extensive as upon the Hudson above Albany. It is true, also, that similar vessels are employed at both places. Steamtugs tow barges there as upon the Hudson; and it is of constant occurrence that steamers towing barges, one upon each side, pass this draw, through the space of 120 feet, without interruption, difficulty or danger. This draw is worked by hand power, and is opened and closed at all times with great facility. The current of the river at

Rock Island is more rapid than at Albany; yet the draw may be opened and a vessel pass through against the current in from two to three minutes, and in 70 seconds if the vessel is moving with the current. These facts explode much of the theory of the complainants' case, and the loose opinions of the navigators upon which these theories are founded. If steamboats, with two barges in tow, can safely pass the draw at Rock Island, 120 feet wide, they can certainly get through a draw at Albany, 150 feet in the clear, if the navigator upon the Hudson has equal skill with those upon the Mississippi.

But it is said that the full natural channel of the river, opposite Albany, is inadequate to the accommodation of the present commerce of the river. This proposition rests upon the statements of a single witness, who says that at times, when the great tows are made up at Albany for New-York, the moving of different vessels about, and putting them in proper position in the tows, causes inconvenience to vessels passing up and down the river. It can be seen how much this statement is worth by reference to a few uncontradicted facts. The water-way at Albany is nearly 900 feet wide. The average width of a New-York tow does not much exceed 150 feet. There have been occasional instances of wider tows, but they are rare. All the witnesses agree that the average is much below 200 feet. Three tows per day leave Albany. They do not start at the same time, nor are they made up at the same time. But if they were all made up together at the same time and place, and allowing each tow to occupy the space of 200 feet, they do not fill up the river. There is still a space of 300 feet left for navigation. It is perhaps the fact that, just at the time the tows are making up, with numerous craft of all classes seeking their proper positions, it may frequently happen that they for a time interfere with the movement of other vessels. And if they do thus fill up the channel of the river and impede

other vessels, these tows are in themselves an unlawful obstruction to navigation, and should be abated as a nuisance. I would like to have the counsel inform me what description of vessel a tow is and if it has the protection of a coasting license. Is this monstrous fleet, of perhaps 40 vessels, embracing a steamboat, barges, sloops, schooners and canal boats, a licensed vessel within the meaning of any act of Congress? Is there any law of Congress that affords protection to such a contrivance in navigation as spreads itself over the entire channel of the river, and obstructs the movements of all other travelers upon the common highway? You might as well say that the rafts of timber floating down the river are vessels sailing under a coasting license, and under the protection of the laws of Congress, as to say that because you have enrolled a steamboat at the custom-house and taken out a coasting license for her, the owner may collect together 40 craft, having no license or enrollment, and occupy the whole navigable channel of the river to the exclusion of other vessels, under pretence that such a method of navigation is entitled to the especial protection of the Congress of the United States.

The laws of Congress authorize the granting of license to *vessels* to engage in the coasting trade and the fisheries. They do not contemplate that a license to one vessel covers a whole fleet that may sail in its vicinity. It does not give a national character to a raft of timber that is towed by a steamer under a coasting license. Nor does it elevate the commercial standing of canal boats that are not equal to the dignity of an enrollment in any of the custom-houses of the country. Yet these great tows, for which so much is claimed, are composed of 30, 40 or 50 barges, canal boats and scows, not having any enrollment or license, and in no way connected with national navigation. And when they are congregated at Albany, and fill up the channel of the river, it is claimed by the learned counsel for Troy that the whole fleet has the protection of the paramount laws of Congress!

If the objection has any force, a plain answer is, that there is abundance of room below where the bridge is to be erected for making up these large tows without material inconvenience. The successful pursuit of this kind of commerce does not require any particular location as a starting point for New-York; and they may as well make up these tows in the river a few rods below as at the present point now occupied for that purpose. Such a change, if necessary for the convenience of the land commerce of the state, could not be regarded as involving any great surrender of the rights of river navigation.

In connection with the number of vessels which at times occupy the channel at Albany and pass above, the evidence of Mr. Van Tuyl is referred to at folio 170 to 178 of the complainants' case. This gentleman kept a register of the vessels, of all classes, passing Bath for a period of nine days, from the 14th to the 24th of November, 1855. He gives a list showing that the passages for the first day were 41; the second day, 39; the third, 45; the fourth, 32; the fifth, 60, and so on; showing, in the final result, an average of 53 passages during nine hours of each day. This gives six passages per hour; and if the draw can be opened and the vessel passed through in five minutes, it leaves the draw of a bridge closed half the time. This statement is, no doubt, as nearly accurate as any furnished by the complainants. But even this presents the case too favorably for Troy. For he says, in his cross-examination, page 66, that a large portion of the vessels embraced in the list did not pass Bath or go to Troy, but stopped at the Albany lumber district, below Bath. During the first day, 12 of the vessels contained in the list stopped at the lumber district; on the second, 6 A large number of the vessels, he proceeds to say, passed into the lumber docks at Albany, but he had not marked them in the table so that he can designate them all. On the 22d of November, the list shows the passage of 77 ves-

sels, of which 35 stopped at the Albany lumber yards, and did not pass Bath or go to Troy.

Here is another effort to magnify the commerce of Troy by adding to it all the vessels trading at Albany, and thus doubling the number of passages at Bath, and also the number of vessels trading with Troy. If we allow them to appropriate the whole, they only make out six passages per hour during the busiest season of the year. If we deduct the one-half that Troy has no right to, we find by this statement that three passages per hour would be ample for the transaction of all the business of Troy and West Troy together. In either view, taken upon this statement of the observations of Mr. Van Tuyl, it is very idle to contend that this number of vessels cannot be readily, and without inconvenience, passed through the draw of a bridge of proper construction and properly managed. It is equally idle also to contend that this number of passing vessels fills up the channel of the river, or that the channel at Albany is too contracted for their accommodation.

With respect to that part of the complainants' case, which tends to show the unfavorable effect of draw-bridges upon property located above, nothing need be said; for, whether the fact be so or not, it has little to do with the question whether a law of the State of New-York, or the erection of a bridge by virtue of it, is in conflict with any right of navigation secured by acts of Congress. The value of property above and below the bridge will not aid us in the solution of this question.

But it is claimed that there is no public necessity for a bridge at Albany, and for that reason the action of the state Legislature should be nullified. This position is assumed by counsel who claim to speak for and represent the city of Troy as the real party complainant before the court. Upon this point, I propose to call the client as a witness against the counsel, to show that he does not correctly present the

views of the party for whom he appears. I therefore call Troy to speak for herself through a document bearing her corporate seal and the signature of her mayor, addressed to the New-York Central Railroad Company, and dated February 1st, 1856. In this official communication, the city of Troy speaks of the bill then pending before the Legislature for the construction of a bridge at Albany, and substantially admits the public necessity for some such measure. This document represents that "The great and constantly increasing passenger and freight traffic on the New-York Central route, between the great lakes and tide water, demands and should have the most expeditious, safe and cheap transit that ingenuity can devise and capital furnish. This demand comes not alone from this state, but from all that portion of the west which finds an outlet to market and to the seaboard over this route, and it must increase with and in as rapid ratio as does the traffic which creates it.

"The history of the various roads forming the New-York Central proves conclusively that the traffic over them has been abundantly remunerative to warrant large expenditures to meet the wants of the public and satisfy its reasonable demands, the results of such expenditures having uniformly been a more than liberal compensation to the roads and a gratifying increase in the business and wealth of the state at large.

"It is the purpose of your subscribers to call your attention to but one cause of complaint, which, as the custodians of the welfare of the city we represent, comes within their province to notice, and, in their judgment, authorizes this communication, viz: *the present incomplete and unsatisfactory connection of the New-York Central railroad with the boats on the Hudson river and the cars of the Hudson river and other railroads.*

"Preceding the act popularly known as the consolidation act, the strife of rival cities to make themselves termini and great railroad depots, and of rival roads to secure to them-

2719

selves business, had a tendency to and did direct that business from its natural channels, and subject it to needless and unjust impositions.

"After consolidation, it was supposed and represented that the road would be operated wholly for its own interests and those of the public, by whose patronage it prospered and was made remunerative.

"Among other important results thereby obtained, was the power (from the equal interest of the Central road in its two branches from Schenectady to tide water) to send through passengers and freight on the cheapest, safest and best route; regarding only the interests of the public in connection with the interests of the road, *and disregarding the demands of either the cities of Albany or Troy, as they had no right and should have no power to subject such passengers and freight to any delays, dangers, charges or impositions.*"

This memorial then proceeds to recommend, as one way to obviate the admitted difficulties, that a new line of railroad be constructed from Schenectady to Troy, with a double track, and necessarily another bridge over the Hudson, for the present railroad bridge at Troy has but a single track, and is not equal to the accommodation of the present railroads which have occasion to use it.

So far as it has been alleged by the counsel for Troy that there is no public necessity for a bridge at Albany, or better connections between the railroads upon either side of the river, I refer to the memorial to show the allegation unfounded. The necessity for a bridge does exist, and the demand for it comes not alone from this state, but from all the states west. There is but a single cause of complaint, and that is, the difficulties, dangers and delays in crossing the Hudson at Albany. This is the language of Troy, and is one of the few statements, made in her behalf, to the truth and propriety of which we heartily subscribe. We are, however, obliged to differ with her in the remedy proposed, and so

did the Legislature of the state, after an impartial consideration of the difficulties stated in the memorial, the necessity for some improvement, and the remedy suggested. They considered that another bridge at Troy would not obviate the difficulty. They proceeded, in disregard "of the claims of either the cities of Albany or Troy, as they had no right and should have no power to subject passengers or freight to delays, dangers, charges or impositions," and consulting only the interest of the public, they could not fail to see that the natural channel of travel and trade had its terminus at Albany, and there it was obvious that a bridge for the accommodation of the public must be located. The city of Troy agrees with all that has been done, save the omission to require the construction of a new railroad to Troy, and in respect to the location of the bridge. Had another bridge been authorized at Troy, we should not have heard of the sacred rights of navigation. If a few millions of dollars had been expended in a new line of railroad from Schenectady to Troy, we should not have heard the railroad monopoly denounced. The city of Troy has a great abhorrence of the extension of corporate power, whether in railroads or bridges, if it be extended in the direction of Albany. No objection, however, arises if the power shall expend itself in the vicinity of Troy. When, therefore, the counsel denounces the railroad power of the state, it is to be understood only to apply to such as are not constructed for the benefit of Troy; and when the project of bridging the Hudson is assailed, with vigorous denunciation, it is aimed only at bridges located outside of the corporation of Troy, and does not apply to the two already erected there, or to the third which the Legislature were invited to authorize, to the end that the travel and traffic of the west might be forced to pay tribute to that city.

To show that there is no public necessity for a bridge, the counsel affirms that the ferries at Albany might be so managed as to meet the demands of travel and business; and a reference

2721

is made to the evidence of a Mr. Valentine, a pension agent at Albany, who describes himself in the papers as engaged in the prosecution of private claims against the general government, and who speaks as one having knowledge in relation to the management of railroad ferries. He condemns the Albany ferry as not conducted upon scientific principles. Of the millions of men who pass these ferries during a season, not one complains of their management except this individual, who devotes his great talents to confounding the general government with prosecutions. Upon our side we have shown that these ferries are managed with all the skill that can be applied to them, at all seasons of the year. Those engaged in managing the ferry can best speak upon the subject, and the agent of the roads, the master of the ferry-boat and others connected with it unite in saying that nothing is left undone that it is possible to do. It is also shown that from a week to ten days in the spring and fall of almost every year the navigation of the river at Albany by means of ferry boats is impossible. During the season of 1854, it happened that for ten days it was impossible to cross the river at Albany with a single pound of freight, in consequence of the condition of the ice. A bare reference to the testimony on these several points will show that the ferry cannot be made to meet the demands of business, nor are the facilities adequate to the public necessity. Nor is it true that any effort has been omitted, by those engaged in the management of the ferry, to employ all the facilities afforded to their fullest capacity.

But, the counsel says, if there is any existing deficiency in the accommodations at Albany, it can be remedied through the present bridge at Troy, by enlarging the capacity of the Troy and Schenectady branch of the New-York Central railroad.

Upon this proposition I beg leave to refer to the testimony of Mr. Wallace, agent of the New-York Central, at Troy,

which will be found at page 77. He shows that the Troy branch of the New-York Central road is worked to its full capacity. This road was built by the city of Troy. Since it became a part of the Central line its condition and capacity have been vastly improved in every respect. As much freight is sent over it as can be taken from Troy by the Hudson River railroad, and all passengers go that way who are inclined to visit Troy. The trains to Troy are run with the same regularity and promptitude as those running to Albany. No discrimination is made either in passengers or freight. The claim now made on behalf of Troy seems to be that freight and passengers should be compelled to go to Troy, and that the New-York Central road should be obliged by legislative action to accomplish this result. The connections at Albany should be kept as incomplete as possible. A new railroad should be built from Schenectady to Troy, and, if need be, another bridge should be erected across the river there. Indeed, these gentlemen seem content with anything, at whatever cost to other people or whatever inconvenience to the public, provided the trade and travel of the west shall, by the force of legislation and the power of courts, be driven from its natural channel and sent over the Hudson at and through the city of Troy. The Legislature did not yield to this imperious demand, and this court will not review or reverse its determination.

Having followed my learned adversary through all the propositions of fact presented by him, with such comments upon each as seemed to me necessary to show the extravagance of the claims made on behalf of the city of Troy, I shall now proceed to call attention to such of the leading facts in the case, proved by the depositions and affidavits, as we regard pertinent to the present inquiry. I have endeavored to show that the leading facts claimed by the complainants, and upon which their claim to an injunction is founded, are not proved. In this effort I have consumed so much time, and referred

so extensively to the evidence upon all points, that I shall not deem it necessary to detain your Honor with many comments upon the printed propositions I handed up, and almost any comment will involve some repetition of what has already been said, in answer to points, on the other side.

With reference to the assumption of jurisdiction by the government of the United States over the Hudson river, at and above Albany, I have already shown that no *overt* act has been done for fifteen or twenty years. No action has been taken for the improvement of the navigation near Albany, except what was had prior to 1841. The works then begun have been abandoned and suffered to go into ruin. If the attempt to improve the river shows an assertion of jurisdiction, the subsequent action of the government shows it to have been abandoned. Up to 1841, Mr. Leadbetter shows that several hundred thousand dollars had been expended upon the improvement. The work was then incomplete; and, to carry out the plan of the improvement projected by the government engineers, would require the further expenditure of from $200,000 to $500,000. Small appropriations have been since made, but the work has not been resumed. The dikes constructed by Colonel Brewerton, above Albany, were carried away by freshets many years ago, and vessels now sail over the spot where the dikes were located, All the evidence upon this subject is that of Mr. Leadbetter (page 13) and Capt. Smalley (page 67). The navigation has for many years only been maintained between Albany and Troy by the constant employment of a dredging machine.

The hypothesis of Mr. Leadbetter, in 1841, as to the interference of the bridge then contemplated with the government works for the improvement of navigation, had reference to the state of things then existing, and to a bridge with a draw 70 feet wide, that being the largest sized draw then regarded as practicable. He says expressly that the apprehended interference was on account of the consequen-

ces which he supposes the piers required would produce. The evidence now given as to the bridge now proposed, shows, beyond a doubt, that all his apprehensions as to the formation of ice dams, sandbars, &c., are without foundation. Besides, the government works now cease to exist. They are among the things that were; and a bridge of any kind will not disturb them.

Upon this state of facts the gentleman claims that the absolute and exclusive possession of these waters is now in the government of the United States, and all state authority over them, in any and every respect, ousted. I deny the correctness of the position, and beg leave to refer to the Wheeling bridge case to show that the Supreme Court of the United States entertained, on this question, a different view from that urged in behalf of Troy; and that the improvement of the navigation of a river by the general government does not exclude the authority of a state. On page 561 (13 *Howard's U. S. R.*) of the report of the Wheeling bridge case, Judge McLean, delivering the opinion of the court, makes this statement:

"That the Ohio river is navigable is a historical fact which all courts may recognize. For many years the commerce upon it has been regulated by Congress, under the commercial power, by establishing ports, requiring vessels which navigate it to take out licenses and to observe certain rules for the safety of their passengers and cargoes. Appropriations, by Congress, have been frequently made to remove obstructions to navigation from its channel."

The right of the State of Virginia to authorize a bridge across the Ohio, notwithstanding all that had been done for the regulation of its commerce and the improvement of its navigation, was fully admitted. True, the particular bridge was adjudged a nuisance, but because it was not erected in pursuance of its charter, and did absolutely obstruct the navigation of vessels carrying one-half the commerce of the

river. In the final judgment, the court approved of a drawbridge over one of the channels upon which the appropriations of Congress had been expended. The principle thereby recognized is very manifest, that, although Congress may have regulated the commerce upon a navigable river, created ports of entry and delivery, established custom-houses, granted coasting licences, and made appropriations for and actual improvements in the navigation, yet, that a state may still, for its internal commerce or the convenience of its citizens, authorize a bridge, if it shall not materially obstruct or impede the passage of vessels sailing under the authority of Congress.

Another suggestion has been made by the counsel, evidently founded in error. He says that the government "has located and maintained a costly fortification upon the banks of the river above the bridge" and at West Troy! Now there is no fortification located there.

Mr. SPENCER. But there is an arsenal.

Mr. REYNOLDS. Yes, a place where muskets, cannon balls and other warlike commodities are manufactured.

The location of this arsenal at West Troy, which, in the complainants' points, has grown to an "extensive and costly fortification," is urged as another indication of the absolute possession of the river by the government of the United States, to the exclusion of all state authority. But the location of an armory has but little connection with navigable waters, and this is obvious from the practice of the government. The Springfield armory, the largest in the United States, is located far away from tide water, and a considerable distance above the point where the Connecticut is navigable, and several bridges are located in its vicinity. The next largest is the Harper's Ferry, in Virginia, at the junction of the Shenandoah and Potomac, and far above any navigation. A bridge spans the river, at this point over 800 feet long. The next in magnitude is the armory near Pitts-

burgh, and is located many miles distant from any water navigation. The armory at Troy, which is the next in magnitude, happens to be located on the banks of the Hudson; but, in order to give any significance to this location, in its connection with tide water, we must assume that the government never intended to carry on war, or have occasion to transfer munitions of any kind, except during the season of navigation. If an enemy should appear while the river was closed by ice, he must wait until the spring freshets are over, and until Capt. Smalley has cleared out all the sand-bars between Albany and Troy, before the contest could begin.

In the next place, we agree that the channel of the river between Troy and Albany is narrow, indirect and devious. It is so also for some distance below Albany. All the witnesses concur in this fact; and it is shown by Capt. Getty that between Troy and Albany the channel is so narrow and crooked that it is difficult to get a tow of 120 feet wide through it. Such a tow, drawing seven feet water, cannot get through in ordinary times. It is shown by several witnesses that some parts of this channel are only from 120 to 150 feet wide, and in certain stages of water only one vessel can pass at a time. It is only in the higher stages that two vessels can pass abreast. And we all agree that in consequence of the difficulty of navigating this channel at all seasons, none of the large tows for New-York are made up at Troy, but laden vessels are towed down in small numbers, and made up at Albany into the large tows for New-York. It would seem to follow that if all the commerce of Troy can pass these narrow and devious channels, it might, by the exercise of ordinary skill, pass the draws of a bridge, if opened in due season, which present double the clear space, in a direct and true current.

In the next place, I affirm that while the bed of the river above and below Albany is subject to changes, by reason of

freshets, so that bars are formed, it is owing, mainly, to the circuitous and indirect nature of the channel at those points and various shore projections that disturb the current. At Albany, for about two miles, the channel is direct and of uniform current, and so confined between the Albany pier and the docks on the east side of the river that no bars ever form there, nor is there danger of any being formed by the piers necessary to support the bridge.

This is shown by the depositions of Messrs. McAlpine, Morris, Burnett, Johnson, Gray and others, who have made actual survey, and have accurate knowledge of the course of the channel and the condition of the bottom. It will be found, in the printed statement furnished by Mr. Gray, that upon his examination of the bed of the river at Albany it was proved to be of a material not likely to be disturbed by a very considerable acceleration of the current. The map of the river shows the course of the channel from Bath to a point below Albany. The deposition of Mr. McAlpine explains the various currents at and above Bath, the causes that disturb them and tend to the creation of sandbars. It also shows the nature of the channel and bed of the river from Bath, for two miles below, and its peculiar advantages for the location of a bridge. The current is direct, the channel wide, and the bottom of a material not easily disturbed by the action of the water. It is clearly shown by these gentlemen, and their view is confirmed by Professor Gillespie of Union College, that piers of the number and size required will not produce any sensible acceleration of the current, or to any such extent as will be likely to disturb the bed of the river at all or form sandbars of any description. The channel at Albany, and for some considerable distance above and below, has been uniformly free from any such obstructions. This fact indicates a marked difference between the bed and currents of the river in the vicinity of the bridge and other points where the formation of bars is a common

occurrence. But it is made the duty of the Bridge Company to promptly remove any bars, occasioned by the piers, which threaten navigation. This provision of the charter, if duly fulfilled, guards navigation from all possible danger from this source.

Again: It is very obvious that the vessels now mainly employed in the navigation of the river above Albany are of a character that a draw-bridge will now present less impediment to navigation than formerly, when sailing vessels were most in use.

This is a fact that bears materially upon the weight of the opinions of those witnesses who testified against a bridge in 1841, when the commerce was mostly conducted in sailing vessels, and when barges and steam towing boats were not employed. The whole character of this commerce, in respect to the means of its conveyance, has changed. Sailing vessels now constitute the exception. Barges and canal boats are now the vehicles for its transportation; and if this bridge be erected in pursuance of its charter—so far elevated above the common tide water that barges without masts and canal boats may pass under it without opening the draw—it would seem that quite all the objections, urged against a bridge by the witnesses sworn in 1841, are obviated.

I have already referred to those parts of the case showing the large decrease in the number of sailing vessels going above Albany since 1845. I have endeavored, also, to show the inaccuracy of the various statements, made on the part of the complainants, of the extent of the present commerce of the river above Albany, and that after all we can gather from the evidence, upon which any reliance can be placed, the business of Troy appears not to have increased, but seems rather to have considerably diminished. I beg to repeat the statement from the evidence, showing a comparison between the commerce of Troy for 1845 and 1856:

(1.) In 1845 the number of steamboats owned at and running to Troy was *eight*. In part owned at Troy, and running regularly, *ten*.

At Albany and below, and frequently running to Troy, *five*, making a total of *twenty-three*.

The number of freight barges owned at Troy in 1845 was *twenty-nine*. Foreign tow barges, trading to Troy, was *twenty*, making a total of *forty-nine*.

The number of masted vessels owned above Albany, in 1845, was *seventy-four*.

Number of foreign vessels with masts trading with Troy, in 1845, *two hundred and fifty-six*.

Total masted vessels, *three hundred and thirty*.

(2.) In 1856 the number of *masted vessels* owned at West Troy was 21, at Troy 3, total 24. *Freight barges* at West Troy 39, at Troy 35, total 74. *One steamboat* owned at West Troy and two at Troy, total three. Fourteen tug steamboats running and towing between Troy and Albany. Twelve Troy and Philadelphia vessels, consisting of propellers and barges. Two hundred and sixty-two cargoes are claimed to have been sent by vessels engaged in the Eastern trade, but the number of vessels thus employed is not given.

It is *estimated*—not proved—that 100,000 tons constitute the tonnage of foreign vessels trading with Troy in 1856, but the number and kind of vessels is not given.

The estimated tonnage of foreign vessels trading with West Troy, in 1856, is 2,950 tons. The number of vessels is not given.

(3.) So far as any reliable data are given, these statements, compared, show a large decrease of the number of vessels owned at and trading with Troy since 1845.

(4.) The total tonnage of all vessels owned at and trading with Troy, in 1844–45, was,..... 48,216

In 1856, the total tonnage of West Troy was,....	14,750
The tonnage of Troy, not including the foreign and Eastern vessels, included in statement of Hazard, on page 40, is,.....	15,625
	30,375
The statement as to the tonnage of the foreign and Eastern vessels is not reliable, because no number of vessels is given, and the amount of freight carried is a *mere estimate.*	
The tonnage of the 256 foreign vessels trading with Troy, in 1844, was put down at, ...	24,716
This, if now adopted, makes,.....	55,191

If this be adopted as the present amount of tonnage of foreign vessels, the increase of tonnage over 1844 is comparatively slight; but as sail vessels going to Troy have largely decreased, it is clear that the tonnage of vessels trading with Troy is less than in 1844.

These comparisons are made from the inventory furnished in 1845 of the then commerce above Albany, with the statements furnished by Messrs. Silliman and Hazard, of the Troy and West Troy commerce, in 1856. It is easy to see that the claim made to a large increase of business is without any visible foundation.

Nor is the claim strengthened by including barges, having derricks used simply in loading and unloading, among the *masted* vessels now owned at and trading with Troy.

In the next place, I claim that the evidence in the case clearly shows that there is no difficulty in navigating a vessel through a draw-bridge, if the vessel be properly handled and the draw properly constructed and managed; and further, that a properly constructed draw-bridge does not present any material impediment or obstruction to navigation. If this proposition be true, it disposes of the present motion. That it is sustained by the evidence can only be seen by

reading it, and I have made a reference to the names of the witnesses and the pages upon which the evidence is to be found to support the proposition. The number is quite large and the evidence conclusive. Some speak of the draw-bridges at Boston, and over the Schuylkill, Hackensack, Passaic, Potomac and Connecticut, in all of which the draws are much narrower than is now proposed; yet navigators say of these bridges that, under ordinary circumstances, they never found any serious difficulty in sailing through them. When we consider the present altered and improved state of things, and with the experience at Chicago and Rock Island demonstrating as an actual fact what would have been regarded as visionary in 1841, it is easy to believe that the inconvenience of draw-bridges, even where there is an extensive commerce, has been greatly exaggerated.

In determining this question of fact we must also remember that the evidence in the case against the practicability of draw-bridges is mainly from navigators who "hold draw-bridges in detestation," and who have only had experience under unfavorable circumstances, at bridges with narrow draws, of imperfect construction, and unskilful management. It is also to be borne in mind that this testimony relates to draws, the largest of which did not exceed 70 feet in the clear; for when most of the evidence was given a draw of 70 feet was the widest known to the science of bridge building. The advances and improvements made in structures of this description render it beyond debate that a draw of over 200 feet clear space is entirely practicable and may be made to operate with great facility. Indeed it may be said that no witness competent to judge has been produced by the complainants who testifies that a draw of 200 feet at Albany, or two draws of 150 feet each, will present any material or substantial impediment or obstruction to commerce. The opinions relied on by the complainants are given with reference to a state of things which does not exist. No

witness says that such draws are not practicable, and no witness is asked the question by the complainants whether all the commerce above Albany may not be passed through draws of the description required by this act, if it be skilfully operated by the aid of steam power. The whole burthen of the testimony against a bridge at Albany relates to bridges of an imperfect construction, of a wholly different character, with narrow draws, under careless and unskilful management. It is even true of the bridges referred to by various witnesses as early as 1841, and the reliable evidence in this case shows the fact — that navigators of ordinary skill, under most circumstances of wind and tide, may pass them without material delay and inconvenience; and it will be found throughout the case that when delay has been experienced at any of the bridges referred to, it has been under unusual and extraordinary circumstances, and such delays are presented as the ordinary results of attempting the passage of a draw-bridge.

The actual experience at Rock Island, Chicago and other places where draw-bridges have recently been constructed over rivers enjoying an extensive commerce explode the great mass of opinions given years ago, and upon which the case of the complainants alone rests. Upon this question I agree with my learned adversary that it is safer to repose upon facts than to rely upon mere opinions. Adopting this rule, upon the point we are now considering, there is nothing of the complainants' case left, for it rests in opinion merely, and opinions upon a state of facts differing materially from those which now exist. We show that at the Clark-street bridge in Chicago 150 vessels have passed in a single day without inconvenience; some sailed through, some steamed through, and some were towed through by small steamers. This bridge is in the street of a crowded city, and has a narrow draw worked by hand power. This largely exceeds the number of draw openings which it can be

claimed the commerce of Troy would ever require. Mr. Van Tuyl's experience for nine days at Bath, and including with Troy vessels all those that went into the lumber district at Albany, does not bring the number of passages up to this figure. Mr. Edwin F. Johnson, whose affidavit we have here, was a witness in the Wheeling bridge case, and stated as a fact that 180 vessels in a single day had been passed through the narrow draw on the Schuylkill river near Philadelphia, and that the average time for passing a vessel was four and a half minutes. These cases are the result of actual observation and experience, and if we regard them in determining the question now before the court, it cannot be a matter of doubt that the commerce of Troy may all pass a draw-bridge at Albany without danger, inconvenience or delay; and it seems a very plain proposition that vessels which safely navigate a devious and indirect channel of 150 feet can, by the exercise of the same care, pass a draw of the same width where the channel is direct; and if all the great commerce of Troy can pass through these narrow channels without material delay, it is too much to claim that it cannot possibly get through two spaces, each of the same width, where the channel is direct and the current true and uniform.

According to the claim made in its behalf, this commerce of Troy is a very extraordinary commerce. It comes quietly and easily enough over the sandbars and through all the narrow places between Troy and the village of Bath, and we hear of no great complaint; but when it gets in sight of Albany—its ancient enemy—it swells up and becomes so inflated as it passes in front of the city that the whole space of 900 feet channel is unequal to its accommodation! Yet when it has with great difficulty got below Albany, and has added to it the much greater commerce of Albany, they travel along together, down the Hudson and through the narrow places at the overslaugh, without material inconvenience.

We venture the prediction that a commerce so flexible as this may, under ordinary circumstances, be passed by Albany through draw openings presenting a clear space of at least 300 feet.

As before remarked, the evidence of Mr. Van Tuyl shows that all the vessels passing Albany requiring the opening of a draw do not exceed five or six per hour. These vessels may all be passed and a draw be closed at least half the time. The calculations made by Mr. Silliman and Mr. Hazard, and the opinions of various witnesses given on this subject, are shown to be wholly fanciful and unreliable in every material respect. And so far as the large New-York tows are concerned, there is nothing to show that they may not as well be made up below the bridge as above.

The public necessity for a bridge at Albany is proved by the act of the Legislature authorizing its construction; by the fact that it is almost impossible to accommodate, in many seasons of the year, the travel and trade across the river; and by the very large amount of freight and the very great number of passengers which require to be passed over at Albany.

I shall only refer to the evidence of Mr. Greene, the agent of the Western railroad, who is familiar with the whole subject. He explains the management of the ferry, and the delays and dangers that attend its operation. From October 1st, 1855, to the 27th of February, 1856, a period of five months, 490,253 passengers crossed the railroad ferries, by means of boats and on the ice, making an average of 3,771 per day. During the same period, 186,743 tons of freight were passed over; the average per day is 1436½ tons, equal to 70 cars each way of 10 tons each. Baggage of passengers for the same period, 3,300 tons, or 25½ tons per day. Express freight carried in baggage cars, 4,945 tons, or 30 tons per day; and 855 tons of mail matter, equal to 6½ tons per day.

The result of a year's business, upon this estimate, is as follows:

No. of passengers crossing a year,	1,176,612
Tons of freight, " "	448,176
" baggage, " "	7,920
" express freight, "	11,768
" mail matter, "	2,124
Making an aggregate of tons of freight, baggage, &c., of,	469,988

The business of all the railroads centering at Albany, and to be accommodated by a bridge, taken from the official reports for the year ending 30th of September, 1855, is as follows:

No. of passengers carried by the Albany & West Stockbridge railroad,	181,429
Total freight, tons,	226,228
No. of passengers carried by the N. Y. Central railroad,	2,717,477
Total freight, tons,	670,073
No. of passengers carried by the Hudson River railroad,	1,540,836
Total freight, tons,	139,968
No. of passengers carried by the Troy & Greenbush railroad,	216,193
Total freight, tons,	80,245
The total passenger business for the four roads above named, for a year, is,	4,555,955
Total movement of freight, in tons,	1,116,514

These do not include the business of the Albany Northern railroad, which during the same time carried 242,151 passengers, and 45,289 tons of freight.

Mr. Greene has given in his evidence a detailed statement of the several items forming the aggregates which I have stated, and they present accurate results, and show an extent of business that requires at least reasonable facilities for its accommodation. But we suppose that for all the purposes

of this case the act of our Legislature proves the public necessity of the measure it has authorized. It is not for this court to review the evidence upon which the Legislature based its action. If the legislation conflicts with no law of Congress, it is immaterial to this court whether it acted wisely or unwisely, whether it is just or unjust legislation, or whether it benefits one interest in the state to the injury of another. There is no allegation that the statute has not been passed through all the forms of state legislation, or that it was procured by fraud or misrepresentation. It is here clothed with all the sanctions of state authority, and is not to be annulled unless it can be made to appear that it contravenes the authority of the general government, or invades some right that is entitled to its protection.

All the railroad facilities that now exist, whether through Troy or Albany, for the accommodation of the immense traffic of the west, are employed to their fullest capacity, and are yet unequal to the demand. Other railroads may be rendered necessary, but if constructed they will be authorized only by the Legislature of the State of New-York. This court cannot require them to be built, or regulate their management, and hence all that has been said upon this branch of the case, upon either side, is immaterial to the present motion. The State Legislature is alone competent to regulate such questions of internal policy, and it may do so without violating any law of Congress or the Constitution of the United States. The federal courts will not interfere to coerce corporations to construct new lines of railroad or to regulate any of the facilities for internal intercourse. And after all this elaborate debate, the material questions of fact, upon the question now at issue, are very few, and are mainly confined to the condition of the river at Albany, the nature of its bed, and the danger of the creation of sand-bars,—the impediments which a bridge may present to navigation, and the nature and extent of the commerce to

be affected,—and the practicability of draws of the magnitude required by our charter. However widely we may have departed from these questions in the discussion, your Honor will return to them in making your decision upon this motion; and we invite the closest examination of all the evidence in the case which may relate to any of them, given upon either side. I agree with my friend, that in this case are involved considerations of great public importance; and its result will affect interests far beyond those of the immediate parties represented before this court. However great may be the anxiety felt by the city of Troy in the present or final issue of this controversy, it is inconsiderable when viewed in comparison with the interests of the people of a great state, and of those who live far beyond its territorial limits. It involves questions of far more consequence than any that appertain to the prosperity of the city of Troy. Her commercial interests are entitled to respect, but they are not of national importance. The salvation of the Union does not depend upon the corporation of Troy. If she fails to control the Legislature of the State of New-York, the foundations of the government will still remain unshaken. Those who represent her here, seek to annul an important exercise of state sovereignty, and seem to regard the invasion of such a right as of little moment when compared with the speedy transit of a canal boat over the waters of the Hudson. The whole commerce of Troy is local and internal in its character. It is mainly created and controlled by state legislation. But for the wealth which the canals of the state pour in upon the Hudson at Troy, her commerce would practically cease to exist. Without the canals what would become of the lumber trade at Troy and West Troy? From what source would her barges be filled with freight? Of what use would be her vessels, and of what consequence would be a bridge? For all her commercial importance, whatever it may amount to, Troy depends upon the North

and West, and upon the canals of the state; yet she denies that the state Legislature may pass a law to affect, in any degree, the very commerce which it has created. She arrogates to herself an authority superior to the sovereign by whose favor she has a commercial existence. Having grown consequential from the facilities granted by state legislation, she claims immunity from the consequences of all laws that may threaten the continuance of any monopoly she may have found profitable. She denies the right of the Legislature to favor any interests but her own. All internal improvement —all extension of commercial facilities—all the avenues of travel and traffic—all the efforts of enterprise, and all the sources of wealth, must be directed to the city of Troy, or the legislation which approves is assailed as unjust, oppressive, subversive of vested rights, and destructive to the welfare of the nation. Her demands are to be first satisfied. She consents to yield to no accommodation of any interest that comes in conflict with her own. The whole land commerce of the country must be stayed, that a few canal boats may float down the Hudson without impediment, and the power of a sovereign state must be cloven down, and great commercial interests incommoded, because they refuse tribute to the corporation of Troy. It is in this aspect that Troy now presents her claims, and upon these principles that she invokes the power of this court.

In opposition to these imperious pretensions we repose upon a law of the Legislature of New-York that contemplates no invasion of any substantial right, public or private. Its object is to extend facilities for the operations of commerce, without material injury to any that exist. It professes loyalty to the general government. It carefully guards against any collision with any rights of navigation protected by laws of Congress. It authorizes no erection in the channel of the Hudson that shall impede the progress of any craft entitled to the freedom of its waters. No

2139

bridge can be lawfully erected until all the evils apprehended are either obviated, or found by actual experiment not to exist. We threaten no violation of law, state or national, and intend to contravene the provisions of no statute securing the rights of navigation. We claim only to be permitted to enjoy the right of crossing the Hudson in such a way as shall not materially affect any interest that navigates its waters. There is no incompatibility in the enjoyment of both these rights in such a way as may furnish to either no just ground of complaint.

But if it be admitted that, in the erection of a bridge for the convenience of a great public interest extending through and far beyond the limits of a great state, it shall, in some small degree, affect the commercial interests of Troy, I deny that it affords any ground for the interference of the court. No great public enterprise was ever consummated without injury to some individual or local interest; and if it may not proceed because some local injury is threatened, the efforts of enterprise are paralyzed and the laws of progress annulled. The history of no country furnishes any precedent for the success of any such experiment as is now made by the city of Troy upon the plea that her business prosperity is in danger. The railroads of the state have substantially annihilated the business of stage-coach proprietors, yet no court interfered to restain their construction, that post-coaches might continue to be the only vehicles for public travel. It cannot be denied but that large pecuniary interests were thus seriously affected, and the introduction of the railroad car as a means of locomotion has worked a complete revolution in nearly all the operations of business. Some localities have been largely benefited and others absolutely destroyed. Yet, in the one case, no charge is collected for the benefits conferred; and in the other, no compensation is awarded for the injury sustained. And if it be that the accommodation of great public interests, by the

extension of railroad facilities which follow a particular channel and seek a particular terminus, may threaten some interest cherished by the city of Troy, I see no more merit in her claim for protection than may be found in a thousand instances where, by public improvements, individual and local interests have been seriously affected. The principle involved in the recognition of such a claim is, that all branches of business, every effort of industry, all the avenues of trade, and every mode of travel that has once existed must be continued in the same direction and without modification or improvement, no matter what exigency may arise, because some individual has made large investments in a particular locality upon the belief that no change was ever likely to occur or would be demanded by any public necessity.

Such claims are often made, but never recognized, either in the halls of legislation or in the courts of justice.

In earlier times in England an improvement in the speed of post-coaches was regarded as an invasion of the vested rights of landlords of country inns, and of those whose interests were connected with the established modes of conveyance. In the year 1669 it was announced that a vehicle described as the Flying Coach would perform the whole journey from Oxford to London between sunrise and sunset. This spirited undertaking was solemnly considered and sanctioned by the Heads of the University, and the time of departure was announced in all public places, under the signature of the Vice-Chancellor. The success of the experiment was complete; and other improvements in the speed and comfort of traveling followed, so that at the close of the reign of Charles the Second Flying Coaches were not only common but were extolled as far superior to any other vehicles known to the world. But, says Mr. Macauley, with boasts like these there was mingled the sound of complaint and invective. The interests of large classes had been unfavor-

2741

ably affected by the establishment of the new diligences, and, as usual, many persons were from mere stupidity and obstinacy disposed to clamor against the innovation simply because it was an innovation. It was vehemently argued that this mode of conveyance would be fatal to the breed of horses and to the noble art of horsemanship; that the Thames, which had long been an important nursery of seamen, would cease to be the chief thoroughfare from London up to Windsor and down to Gravesend; that saddlers and spurriers would be ruined by hundreds; that numerous inns at which mounted travelers had been in the habit of stopping would be deserted and would no longer pay any rent; that the new carriages were too hot in the summer and too cold in winter; that the passengers were grievously annoyed by invalids and crying children; that the coach sometimes reached the inn so late that it was impossible to get supper, and sometimes started so early that it was impossible to get breakfast. On these grounds it was gravely recommended that no public carriage should be permitted to have more than four horses, to start oftener than once a week or to go more than thirty miles a day. It was hoped that if this regulation were adopted, all except the sick and the lame would return to the old mode of traveling. Petitions embodying such opinions as these were presented to the King in council from several companies of the city of London, from several provincial towns and from the justices of several counties. We smile at these things, proceeds the historian, but it is not impossible that our descendants, when they read the history of the opposition offered by cupidity and prejudice to the improvements of the nineteenth century, may smile in their turn.

In many respects, the city of Troy occupies the same position with those worthy Englishmen who claimed that public conveyances should start but once a week and travel only thirty miles a day. The counsel here claims

that travelers shall be compelled to take some rest and repose when they reach the Hudson river, and that end must be accomplished by rendering a passage of the river at some periods a practical impossibility.

The argument now urged by Troy was heard in the days of the apostle Paul. Under his preaching at Ephesus, many came and believed, and many also of them which had used curious arts, brought their books together and burned them, and they counted the price of them and found it fifty thousand pieces of silver. At the same time a great stir arose, for a certain man named Demetrius, a silversmith, which made silver shrines for Diana, brought no small gains unto the craftsmen, whom he called together, with the workmen of like occupation, and said: Sirs, ye know that by this craft we have our wealth; moreover, ye see and hear that not alone at Ephesus, but almost throughout all Asia, this Paul hath persuaded and turned away much people, saying that they be no gods which are made with hands; so that not only this our craft is in danger to be set at naught, but also that the temple of the great goddess Diana should be despised and her magnificence should be destroyed, whom all Asia and the world worshippeth.

And when they heard these sayings, they were full of wrath, and cried out, saying: Great is Diana of the Ephesians! and the whole city was filled with confusion. And having caught some of Paul's companions in travel, they rushed with one accord to the theatre; and some cried one thing and some another, for the assembly was confused, and the greater part knew not wherefore they were come together. And one Alexander beckoned with his hand, and would have made his defence with the people. But when they knew he was a Jew, all, with one voice, for the space of two hours, cried out, Great is Diana of the Ephesians!

And the town clerk finally appeased the people, and advised them to do nothing rashly, saying, if Demetrius and

2743

the craftsmen which are with him have a matter against any man, the law is open, and there are deputies, let them implead one another. Whether a suit was instituted or not, the sacred historian does not inform us.

The uproar at Ephesus, on account of the preaching of the apostle, was not greater than that at Troy on account of the construction of a bridge at Albany. It has been continued for nearly forty years, and they cry out, saying, "Great is the commerce of Troy! By great corporate power, and by means of great lines of railroad communication, much people and much commerce will be turned away from us. But the law is open, let us implead the public."

Demetrius and the silver craftsmen of Ephesus desired to restrain the progress of the Christian religion because it threatened to annihilate the business of manufacturing silver gods for the temple of Diana.

The corporation of Troy desire to restrain public enterprise because it may injuriously affect their pecuniary interests.

However widely the two cases may differ in other respects, the principle operating in both is the same. The same reason that moved the followers of Demetrius against the preaching of the apostle Paul, moves the city of Troy to appeal to this court. In the one case, the Christian religion continued its progress; and in the other, we believe that the authority and dignity of a great state will be fully vindicated and maintained.

2743

In the Circuit Court of the United States

OF THE NORTHERN DISTRICT OF NEW-YORK.

ARGUMENT OF NICHOLAS HILL, JR.

MAY IT PLEASE THE COURT:

If I had consulted my own judgment exclusively, the case on the part of the defendants would be submitted for your consideration now on what has been said by my associate, without any remarks by me. It has been shown by him, if I mistake not, with a fullness and force of illustration which leaves little or nothing to be added, that the present application is without merit, and should be denied; and this having been done, the task of counsel is ended and their whole duty discharged. But he thinks something more should be said relating directly to the law on which the fortunes of the case depend, and in compliance with his request, I will submit a few additional observations, limiting them, however, to such topics as can be disposed of between this and the hour of adjournment.

The application is for that species of extraordinary and summary process known as a "preliminary injunction." It is made before the defendants have done any act under their charter, and before the plan of their bridge, so far as the particular nature of the structure is concerned, has been adopted, or even conceived. The theory which underlies the bill of complaint, and on which it must be sustained, if

at all, is that a draw-bridge over the Hudson at Albany, no matter how fashioned or built, will *inevitably* obstruct navigation so as to be a public nuisance; that this result cannot be avoided by any of the modes of structure which modern improvements in the art of bridge building, stimulated by the exigencies of modern commerce, have hitherto suggested; and that a *lawful* bridge, one which will not so obstruct navigation as to destroy the rights imparted by a coasting license, is an utter physical impossibility—a thing above the reach of human intelligence, and beyond the compass of human power. And on this theory, supported mainly by the speculative opinions of witnesses who testified before the Legislature as early as 1841, and opposed by all the reliable evidence obtained recently, you are asked to enjoin, not a particular mode of erecting the bridge, but all conceivable modes; to prevent all action under the charter; to stop all effort to comply with its provisions; and to adjudge, in effect, that New-York has no power to bridge the Hudson at Albany, whatever may be due to the welfare of her citizens, or however imperious the public demand for the measure.

This summary and comprehensive sentence of annulment, moreover, is invoked against an exercise of state jurisdiction which evinces on its face no spirit of disloyalty to the authority of the general government, but which recognizes that authority as paramount, and forbids any unlawful interference with it. And hence you have been called upon to adjudge that the act authorizing the erection of the bridge, though fair in all outward seeming, is not what its language plainly imports; that instead of being an honest exercise of local legislation, it is an unworthy device, designed for purposes not indicated by its provisions; that it is in truth a covert attempt to reach objects beyond the sphere of state control, and under the protection of national authority; and that its professed allegiance to that authority

is feigned and hollow — a lying juggle — an arrangement of words intended to *conceal*, rather than *express*, the inner life of the measure.

These features of the application alone, without adverting to others, show that it belongs to a class of experiments upon judicial power, which, though sometimes attempted, have hitherto uniformly failed. I listened with attention to the numerous cases commented on by the counsel who opened in behalf of the plaintiff, to ascertain whether there was one in which an injunction had been granted under circumstances like the present. His researches coincide with my own, and enable me to assert with entire confidence that no instance of the kind has ever occurred. The case of the *Wheeling bridge*, on which some reliance seems to have been placed by him, furnishes no warrant for this proceeding. The court did not grant a *preliminary* injunction there, but refused to do so; nor did they act on *ex parte* or conflicting evidence; nor on speculative possibilities; nor on disputed theories of any kind. The defendants were not only allowed to erect their bridge, but no injunction was granted until after the effect of the structure upon navigation had been ascertained, with mathematical precision, by a trial before a referee. Nay more, even after the referee had reported the fact of obstruction, the court did not grant the application without giving the defendants the fullest opportunity of obviating the difficulty, if they could, by a draw-bridge over the western channel of the river; and they were accordingly allowed to try that experiment. (*See* 9 *How. R.*, 647, *et seq.*; 13 *How.*, 519, 568, 9, 624, 5.) I shall have occasion to speak of that case, and of some of the principles established by it, hereafter. I advert to it now for the mere purpose of showing that this application claims no kindred with precedent; that it steps boldly in advance of all precedent, and challenges the distinction of *a pioneer* — a solitary pioneer in regions of power hitherto unoccupied by any judicial tribunal.

The act authorizing the erection of this bridge has been spoken of by counsel as an impertinent intrusion on the federal domain, and the *Passenger case* has been referred to as a like instance of intrusion, which the courts had rebuked. (7 *How.*, 283.) As I wish to disembarrass the present question of all irrelevant discussion, I will submit an observation or two upon that case, and the entire class to which it belongs, before proceeding further. The state there, according to the judgment of the court, had, by her legislation, undertaken to act *directly upon a subject within the jurisdiction of Congress*, and thus the old controversy between the advocates of exclusive and concurrent power was once more revived. Where a state assumes to intervene in such matters, there is some reason to say that she is a volunteer in affairs not entirely her own, whatever may be the true theory as to her *power* in such cases. She is then attempting to supply what she deems defects in national legislation, and is doing that which Congress *might* and probably would do, if the public interest required it. The *Pilot case* (12 *How.*, 299) furnishes an instance where even that species of legislation was upheld, and though the judgment pronounced was cautiously limited to the particular occasion, the opinion points to principles which will yet, I believe, be applied to other cases, involving the antagonistic theories to which I have alluded. I refer to this part of it: "When it said that "the nature of a power requires that it should be exercised "exclusively by Congress, it must be intended to refer to "the *subjects* of that power, and to say they are of such "*a nature* as to require exclusive legislation by Congress. "Now the power to regulate commerce embraces a vast "field, containing not only many, but exceedingly vari- "ous subjects, quite unlike in their nature; some impera- "tively demanding a single uniform rule, operating equal- "ly on the commerce of the United States in every port; "and some, like the subject now in question, as impera-

"tively demanding that diversity which can alone meet "the local necessities of navigation. Either absolutely to "affirm or deny that the nature of the power requires ex- "clusive legislation by Congress, is to lose sight of the *na-* "*ture of the subjects* of this power, and to assert concerning "them all, what is really applicable to but a part. What- "ever subjects of this power are in their *nature national*, or "*admit* only of one uniform system or plan of regulation, "may justly be said to be of such a nature as to require "exclusive legislation by Congress."

But I have referred to this class of cases for the purpose of showing that they are plainly distinguishable from the present, and that the general question there discussed, which has so long perplexed the judicial mind, does not now arise. The offence of New-York, if she has offended, consists in attempting to authorize the erection of a *New-York bridge*, to accommodate the urgent and constantly increasing necessities of New-York travel and commerce. The *subject* of jurisdiction on which she has directly acted, therefore, is not national in any sense, and the authority which she has exercised belongs to that mass of power not even tendered to the general government by the Constitution, but *reserved to the several states*. I repeat, the subject of jurisdiction in its whole length and breadth — the bridge, the public necessity for it, the possibility of so constructing it as not materially to injure navigation — all — all were matters to be determined, in the first instance at least, by New-York; as much so as any question relating to her canals, or her highways and ferries, or any other branch of her internal police. (9 *Wheat. R.*, 203; 4 *Hill's R.*, 149, 150; 15 *Wend. R.*, 113; 3 *McLean's R.*, 228; 11 *Peters' R.*, 133, 147; 1 *Woodb. & Minot*, 506, 7; 1 *Hill's R.*, 469; 4 *Sandf. Super. Ct. R.*, 492; 5 *McLean's R.*, 426, 7; *Rock Island Bridge case, Pamphlet.*) The case is not one, where, as in the Passenger and Pilot cases, she could have appealed to Congress to

judge and act for her, by adding to or altering its own line of policy. Her citizens had no resource but their own local sovereign, for no other power on earth could lawfully listen to their complaints, or grant them relief. And if she has touched any subject not exclusively within her own control, which I deny, she has not done so voluntarily, but because the act was unavoidably incident to the exercise of her proper jurisdiction. I speak of a New-York bridge, not a national one; a bridge called for by the necessities of a state, and designed to facilitate its own internal commerce; and I maintain that Congress has no primary jurisdiction, none whatever, over such a subject. In the *Wheeling bridge case*, (18 *How.*, 421,) which has been cited to prove the contrary, Congress had virtually declared the bridge necessary for national purposes; and the court assumed this to be so in making its decision. It contains nothing, not a word nor a syllable, favoring the monstrous heresy that the general government can rightly intervene in mere state affairs, by authorizing the erection of a bridge not needed for national, but for mere state purposes. (*See Rock Island bridge case, Pamphlet, pp.* 6, 7; 15 *Wend.*, 123, *Butler arg.; id.*, 133, 4, *Savage, C. J.*)

What then has New-York done that she should be arraigned and treated here as an officious intermeddler with affairs not her own? She has listened to the petitions of her citizens in favor of the proposed bridge, and to the remonstrances of Troy against it. The very testimony on which the present application is founded is but a partial transcript from her records, and shows what were the questions submitted to her judgment. This theory of utter physical impossibility was one of them, and she has decided it, not as a volunteer, but because *she alone had power to judge in that stage of the controversy*. She has not claimed, but disclaimed, the power of erecting a bridge which shall substantially obstruct or even impede the navigation of the Hudson. She would harm

herself and be unjust to her own citizens by acting thus; and she would not do it if she could, and could not if she would. She has said that her local necessities require this bridge; that it can be built without material injury to navigation; that the plaintiffs' theory of impossibility is false; and that the witnesses in favor of it are blind guides. I claim for her, therefore, the benefit of all those presumptions which the law extends to public bodies of every grade, even the lowest, while acting apparently within their appropriate sphere of public duty. I claim that before this charter shall be annulled, for defects not appearing on its face, but proved *aliunde*, the court will demand higher and more perfect assurance than is furnished by the evidence culled from the records of the Legislature. I claim that before the state shall be finally compelled to renounce this branch of her sovereignty on the theory which underlies the present application, that theory shall be subjected to the test of actual experiment. Or if the court will ever act in advance of experiment, and so as utterly to preclude that test, now and forever, I claim that the evidence should be entirely above the suspicion of bias or exaggeration; that it should rest on fast-anchored facts, not the shifting sands of conjecture; and above all, that it should be concurrent and clear, not conflicting and contradictory. It should be that kind of evidence, which, notwithstanding the evidence opposed to it, relieves the mind from every lingering shadow of doubt, and enables a judge to pronounce with unfaltering confidence that the Legislature has mistaken the facts on which it has acted. (19 *Barb. R.*, 81; 26 *Pennsylv. R.*, 317; 6 *Cranch's R.*, 128; 3 *Denio's R.*, 394; 2 *Story's Eq.*, § 924 *a*, 959 *b*, *6th ed.*; 5 *McLean's R.*, 439; 14 *Conn. R.*, 565, 6; 7 *Barb.*, 508; 9 *Hamm.*, 52, 60, 1; 8 *Dana's R.*, 299, 308; 2 *Mylne & Craig*, 570, 1.) I will not stop to comment on the evidence in favor of the plaintiffs' hypothesis, nor on that opposed to it. My associate has done this, and I hasten to another branch of the discussion.

The learned counsel who opened the plaintiffs' case, fearing probably that the evidence *aliunde* would not justify the summary interference of the court, has resorted to another line of argument. He has said, and said truly, that a draw-bridge over navigable waters always impedes navigation to *some extent;* but he has added, that *any* interference with this right, no matter how *slight*, is a violation of the constitution. I deny the last branch of the proposition, and for the purpose of showing that it has no foundation in the law, I shall rely mainly on what the federal courts and others have directly decided. For though the adjudged cases leave the *maximum* of allowable conflict undefined, they will be found to sustain, if I mistake not, a doctrine far more favorable to state authority than is necessary to defeat the present application. At all events, they lend no countenance to the singular proposition urged here, that a mere coasting license gives an absolute right to traverse navigable waters without any hindrances except those which nature interposes in the pathway of a vessel. On the contrary, they recognize the local right of crossing such waters by means of draw-bridges, as one equally legitimate and lawful with the right imported by a coasting license. Both are *rights* in the highest sense of the term, and both are necessary to the general welfare and prosperity of the country; and though they can never be exercised without conflicting to some extent, both are to be preserved if they can be adjusted on fair and equitable principles. I do not deny, but expressly admit, that where these rights are so incompatible that no adjustment is possible, the one derived under the law of Congress is paramount, and the other must be surrendered. But a state will not be compelled to renounce this attribute of her sovereignty on any fanciful or extreme theory; nor because its exercise may occasion some inconvenience to boatmen; or subject them to slight additional delays; or impose on them the necessity of increased vigilance and care; or even require them to

2753

abandon an accustomed track or place of business. To warrant the utter annulment of the local right, the conflict must rise to that degree which is called for, when two statutes, passed by the *same sovereignty*, come in apparent collision, and the last is said to repeal the first by implication. It must amount to gross and palpable inconsistency, to substantial and irreconcilable discord, to deadly hostility; or, in the words of Mr. Justice Story, "there must be a plain *incompatibility*, a direct *repugnancy*, or an *extreme* practical inconvenience leading to the same result." (1 *Story's Const.*, *p.* 432; 5 *Wheat.*, 48, 9; 1 *Woodb. & Minot*, 417, 418; 13 *New Hamp. R.*, 574, 5; 5 *Hill's R.*, 225, 6; 4 *How. R.*, 37, 51; 15 *East's R.*, 371; *and see* 5 *Wheat. R.*, 48, 49, 50.) The dividing line where allowable conflict ends, and irreconcilable repugnancy begins, cannot be marked, with mathematical precision, by any general definition. It must be sought for by a careful attention to what the courts have said on the subject, and by a wise appreciation of the demands of all kinds of commerce, whether state or national. And above all, it must be sought for in the spirit of an enlarged and comprehensive equity, with a determination to impose no restrictions upon the authority of the states beyond such as will fairly satisfy the demands of actual and existing national legislation. For the question is not, as has been assumed here, what power the general government *may* exercise under the jurisdiction tendered by the Constitution, or how far Congress *can* interfere with the sovereignty of the states by pragmatic or unnecessary laws; but simply whether that body *has* interfered to the extent claimed by the plaintiff. (3 *Wheat.*, 387; 1 *Woodb. & Minot*, 506, 7; 5 *Wheat.*, 48, 9.) In other words, the question is whether the acts of Congress relating to coasting licenses, the only existing national legislation on the subject, were designed to destroy the local right of crossing navigable waters by means of draw-bridges — a right which has been exer-

cised under them by the states, with the entire acquiescence of the general government, for nearly three-quarters of a century! (1 *Stat. at large, p.* 55; *id.*, 305; 1 *Woodb. & Minot*, 506, 7; 15 *Wend.*, 136.) To that question I now invite your attention.

The counsel for the plaintiff, with a frankness which deserves our acknowledgments, has told you that the real prosecutor of this suit, and of the other commenced at the same time, is the city of Troy; she having persuaded herself that the proposed bridge will incidentally benefit another locality at her expense. Troy has some experience in draw-bridges, and has once before discussed the question now under consideration, though she occupied then a stand-point far different from the one she occupies to day, and advocated a far different doctrine. On that occasion her local interests were all *in favor* of the exercise of this power by the state, and she was not only allowed to maintain a draw-bridge over the Hudson, but a very poor one, if her present witnesses are to be believed, below the head of tide-water and navigation, and within a port of delivery. (15 *Wend.*, 113.) I am willing that the counsel who then spoke in her behalf should answer the counsel who has spoken for her here, and I will be silent; nay, I will consent that this case shall be decided according to the views she then entertained. They were these: "The object of the act in question, [the act authorizing the erection of a draw-bridge at Troy,] was to facili-
"litate intercommunication between the citizens of the
"state; its bearing upon the commerce of the states being
"very remote. It is an internal improvement for a local
"purpose to which *the power of the general government does not*
"*extend, and which exclusively belongs to the state government.*
"The general government cannot *authorize* the erection of
"such a bridge, nor can it *prohibit* its erection. The right
"of a state to establish ferries has never been disputed, and
"bridges are but substitutes for ferries." (15 *Wend.*, 123.)
"To pass a draw-bridge must necessarily cause some delay,

"but it cannot with propriety be said to be an *interruption* "*to navigation.* As well might it be said that our quaran- "tine laws come in collision with the law of Congress in "respect to navigation. Under those laws, vessels are not "only delayed for weeks, but sometimes wholly prevented "from reaching their port of destination. The right of en- "forcing quarantine laws has never been disputed, and yet "to open communications and facilitate the business trans- "actions of its citizens is the *duty of a state Legislature*, as well "as to guard and protect the health of the inhabitants of "the state. Laws for any of these purposes, *passed in good* "*faith, without intent of encroachment on the powers of the general* "*government, and only incidentally and not essentially coming in* "*collision with those powers, ought to be held valid.* The powers "of each government must be *reasonably* exercised; the rights "of either must not be *unnecessarily* infringed, and inconve- "niences arising from the exercise of *common rights over the* "*same subject must be submitted to.* In short, the principle, *sic* "*utere tuo ut alienum non lædas*, applied to individuals in the "enjoyment of a *common right*, should control this question "between the general and state governments. In this way "the essential rights of each will be secured." (15 *Wend.*, 133, 4.)

Such was the creed of national and state sovereignty which Troy held in 1835, and her views were so obviously in harmony with the true spirit of our government that they commanded the unanimous assent of the court. I quote a few passages from the opinion of Chief Justice Savage. At p. 132, he concedes that the place where the bridge was built "is one where coasting vessels have a right to pass, "and where any erection entirely obstructing or essentially "impeding navigation would be unlawful;" and at p. 133 he says: "By a free navigation must not be understood a "navigation free from such *partial obstructions and impedi-* "*ments as the best interests of society may render necessary.* For

"example, a vessel arrives at the port of New-York from a "foreign port; Congress has exclusive power to regulate "commerce with foreign nations; the vessel arrived has "sailed under the authority of Congress, but she is met at "the quarantine ground—not by a bridge with a draw "which she may pass in *half an hour*, but by a mandate from "the state authority, stating, in substance, that the con- "veniences or necessities of the people of the port require "that she shall remain at quarantine, one, ten or twenty "days, according to circumstances. Is such a detention "unconstitutional? The contrary has been adjudged, as "far as that point could be adjudicated in the case of *Gibbons* "v. *Ogden*." "I have already stated that the general gov- "ernment and the state government, between them, possess "the soveregn power; and the *sovereign power may doubtless* "*build bridges where necessary*. It has been correctly said "that the federal Constitution is a grant of power, while "the state Constitutions are limitations of power. There "is in our state Constitution *no limitation of the power to build* "*bridges, and there is in the federal Constitution no grant of such* "*a power. There can be no question, therefore, that the state Legis-* "*lature has the power to build bridges where they shall be necessary* "*for the convenience of its citizens*. The right must be so exer- "cised, however, as not to interfere with the right to regu- "late and control the navigation of navigable streams. "Both governments have rights which they may exercise "over and upon navigable waters; and it is the *duty of both* "so to exercise their several portions of the sovereign power, "that the greatest good may result to the citizens at large. "It is the duty of the general government to adopt such "measures that commerce and navigation shall not be im- "properly obstructed;—and it is the duty of the state gov- "ernment to afford all the facilities of intercourse which "the good of her citizens require. The maxim *sic utere tuo* "*ut alienum non lædas*, is the rule for both governments."

He then, at p. 135, 6, adverts more directly to the *degree* of conflict which must exist before a state is driven from this field of duty, and obliged to surrender her power to legislate for her own citizens. "There is a material distinction "between a *draw-bridge*, which detains a vessel for only a "short time, and a *dam which stops the navigation entirely*. The "bridge in question with a draw, is no greater obstruction "than the *dam* erected a short distance north, but still be- "low the villages of Lansingburgh and Waterford. The "dam would be an illegal obstruction *but for the locks* by "which vessels pass it. So would the bridge *without a draw;* "but having a draw, it is no *greater obstruction than the dam* "*with a lock*. Instances of bridges over navigable waters "are very numerous. And neither the federal government, "nor the federal judiciary, have shown any disposition to "act otherwise than with liberality, in the exercise of the "powers granted; nor can they be justly charged with an "inclination to encroach on the *reserved powers of the states*."

This question as to the degree of allowable conflict, when unavoidably incident to the exercise of state jurisdiction, was considered also by Mr. Justice McLean, in the case of *Palmer* v. *The Comm'rs Cuyahoga Co.*, (3 *McLean's R.*, 226.) There an injunction was applied for to prevent the construction of a draw-bridge over navigable waters protected by the ordinance of 1787 as well as by the Constitution. The injunction was denied, and the court, in pronouncing judgment, used this language: "A *dam* may be thrown over a river, "provided a *lock* is so constructed as to permit boats to "pass, with little or no delay, and without charge. A "temporary delay, such as passing a lock, *cannot be considered* "*an obstruction*." And in a subsequent part of the opinion, it is added: "A *draw-bridge* across a navigable water is *not* "*an obstruction;* the obstruction would be but momentary, "to raise the draw; and such a work may be very import- "ant to the general intercourse of the community. No

"doubt is entertained, therefore, as to the power of the "state to erect such a bridge." I have already referred, for another purpose, to a more recent case decided by the same learned judge, where the same general doctrine was maintained, and an injunction denied; and I invite your attention to it again in connection with the present topic. (5, *McLean's R.*, 426, 7.)

The case of *Gibbons v. Ogden*, (9 *Wheat.*, 1,) relied on by the plaintiffs' counsel, throws no light on this question of allowable conflict. The question there was whether a state could, by her legislation, utterly *exclude* all vessels propelled by steam, except those owned by particular persons, from her navigable waters; and it holds that *absolute exclusion* is unconstitutional, and it holds nothing more. I called your attention in a previous part of the argument to the broad and liberal concession of state jurisdiction which is made in the opinion at p. 203, and beyond this, I submit, the case has no relation whatever to the present controversy.

The *Wheeling Bridge Case* (13 *How.*, 518), is one which, strange as it may seem, is relied on as an authoritative adjudication in favor of both the parties to this suit. I referred to this case also in a former part of the discussion, and I now recall your attention to it for the purpose of showing that it confirms all the leading principles for which the defendants contend. The question was, in effect, whether a *suspension bridge*, which had been erected over the eastern channel of the Ohio river at Wheeling, between the shore and Zane's Island, was a public nuisance; that island being about three miles long. I have already said that no *preliminary* injunction was there granted by the court. The disputed facts were referred to Chancellor Walworth, who reported, among other things, that the bridge was an *absolute obstruction* to steam vessels with chimneys of a certain height; that about one-half of the commerce of the river was carried on by vessels having chimneys of this character; that these tall chimneys, owing to the

peculiarities of the river, were necessary to the successful prosecution of commerce; and that the process of lowering them at the bridge was imminently dangerous to the lives of the crew and passengers. Even after this report, however, the court struggled to adjust the conflicting interests involved so as to do no unnecessary injury to either; and a second reference was ordered to Mr. McAlpine, to ascertain whether an adjustment was possible. He reported against the practicability of a draw in the *suspension bridge*, but in favor of one in the bridge leading from Zane's Island to the western shore; and the court allowed that mode of adjustment to be tried. The eastern channel, which, as I have said, was about three miles in length, had been improved by the general government, and yet the obstruction of it by the suspension bridge was not deemed unlawful, so long as vessels could safely pass on the other side of the island. The case overthrows the entire argument of the plaintiffs' counsel. True, it holds that the right of navigation cannot be *destroyed* by a suspension bridge, any more than by a dam without locks, or an ordinary bridge without draws, or an exclusive grant; and so far it agrees with all the preceding cases. But it holds also, that a draw of suitable dimensions, though it involves delay, shuts up an accustomed channel, and obliges vessels to travel an increased distance to find a new track, is not an unlawful obstruction. And it holds further, that this important branch of local sovereignty is not to be annulled, or even suspended, until every measure which promises an equitable adjustment of conflicting rights has been fairly tried.

To show that I am speaking in the spirit of that case, in accordance with its essential doctrines not only, but even its *dicta*, I quote one or two passages from the final opinion. "The right of navigating the Ohio or any other river in our "country does not conflict with the right of bridging it. "But these rights can only be maintained when they are so "exercised as not to be *incompatible* with each other. It "is in their improper exercise, and not in *their nature*, that

"any incompatibility exists." (*P.* 623.) "When the subject "of a draw was first suggested to the court, it was intimated "that *no draw was known which exceeded seventy feet*, but it was "supposed that one of *eighty feet* might be constructed. And "the court then said, 'we entertain great doubts whether a "draw in either of the bridges, *as proposed*, can be constructed "so as to afford a convenient passage for the steamboats that "ply on the Ohio river.' But a draw of *two hundred feet in* "*the clear is now proposed*, and one less than that would not "answer the public demand." (*P.* 624.) "The inconsidera- "ble delay of two or three minutes in passing the draw, and "running the increased distance of the western channel, does "not constitute a *material obstruction*. From the statement "made, the increase of time would be less than is ordinarily "consumed *in landing or receiving a passenger at the shore*." (*Id.*)

It was contended there, as it has been here, that the general government, having improved the eastern channel, had thus consecrated it to national purposes, and that state authority could not touch it. And further, that those navigating the river with this imposing document called a coasting license, had an absolute right to use the eastern channel, which the courts were bound to enforce at all hazards. The opinion closes by disposing of this view, thus: "In the "multitudinous concerns of commerce, we must view things "*practically*, and cannot deal in *abstractions*. Cases may arise "in which great interests are involved, that may have had "their origin in *wrongful acts*, yet connected with circum- "stances which render it difficult, if not impracticable, to "do the thing, or cause it to be done, which is most fit and "proper. In such cases, as in the law of mechanics, equi- "valents are of necessity substituted. And if the thing done "be *all that justice can require, it may suffice*. Such is not "unfrequently the necessary action of a court of chancery."

I invite your special attention to this part of the opinion, because it asserts the power of adjusting and reconciling jarring rights and conflicting interests in a clear and most

emphatic manner. The interest of the defendants, in whose favor the power was exercised, was one which originated in acts done contrary to *their charter* as well as the law of Congress; (9 *How. R.*, 642), and yet the court said they would not unnecessarily destroy even that. Instead of enforcing the rigid and impracticable rule contended for by the plaintiffs, they exercised the power to which I have alluded, and applied the maxim *sic utere tuo ut alienum non lædas.* And if that power will be exercised for the protection of such an interest, how much more prompt and liberal should be its exercise when the necessities of a whole people demand it, and when the sovereignty of a state depends on the issue! The iron handed justice which has been invoked here is alien to the whole spirit of our government. Whether mere logical consistency, and a regard for what is sometimes called the symmetry of the law, would justify its adoption, as the counsel for the plaintiff has argued, I will not stop to inquire. Human laws are not made to furnish forth a spectacle of uniformity for the gratification of theorists and philosophers, but for practical ends; and hence the numerous exceptions to general rules, and the various maxims for adjusting conflicting rights. We have been asked, whence do judges get this power of refusing to enforce a right, and of substituting a fair equivalent? I answer, it belongs to their general power of acting reasonably, of adapting the law to the varying necessities of society, of determining individual rights in view of the higher demands of public expediency, and of requiring both men and governments to use their own so as to do no *unnecessary* injury to others. (15 *Wend.*, 134; 3 *Paige's R.*, 577; 21 *Barb.*, 418, 421.)

But the hour of adjournment has arrived, and I leave the case of the defendants for your consideration.

IN THE

Supreme Court of the United States,

ON A

CERTIFICATE OF DIVISION OF OPINION BY THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

IN EQUITY.

ROBERT D. SILLIMAN
agt.
THE HUDSON RIVER BRIDGE COMPANY AT ALBANY.

FREDERICK W. COLEMAN
agt.
THE SAME.

Statement of Case, Abstract of Pleadings, and FACTS Claimed to be Established on the part of the Defendant.

JOHN H. REYNOLDS, Solicitor for Defendant.

ALBANY:
MUNSELL & ROWLAND, 78 STATE STREET.
1859.

2769

IN THE

Supreme Court of the United States,

ON A

CERTIFICATE OF DIVISION OF OPINION BY THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

IN EQUITY.

ROBERT D. SILLIMAN
agt.
THE HUDSON RIVER BRIDGE COMPANY AT ALBANY.

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agt.
THE SAME.

Statement of Case, Abstract of Pleadings, and FACTS Claimed to be Established on the part of the Defendant.

JOHN H. REYNOLDS, Solicitor for Defendant.

ALBANY:
MUNSELL & ROWLAND, 78 STATE STREET.
1859.

IN THE

SUPREME COURT OF THE UNITED STATES

ON

A Certificate of Division of Opinion by the Judges of the Circuit Court of the United States for the Northern District of New York.

IN EQUITY.

1

ROBERT D. SILLIMAN

against

THE HUDSON RIVER BRIDGE COMPANY AT ALBANY.

FREDERICK W. COLEMAN

against

THE SAME.

2

Statement of Case, Abstract of Pleadings and Proofs; and Facts Claimed to be Established on the Part of the Defendants.

FIRST—Brief History of Case, Abstract of Pleadings, etc., etc.

The bills in both the above causes were filed in the Circuit Court of the United States for the Northern District of 3
New York, in October, 1856, for a decree restraining the defendant from erecting a bridge across the Hudson river at Albany, pursuant to an act, chap. 146, of the laws of the legislature of New York, for the year 1846. The defendant put in answers to both bills, to which general replications

were filed and testimony taken, and both causes came on for
4 hearing upon pleadings and proofs. And upon the hearing the judges divided in opinion upon the whole case, both as to the law and the facts, and upon a certificate of such division, under the act of Congress, the cases come before this court. The leading features of the controversy, as disclosed by the pleadings, are as follows:

On the 9th of April, 1856, the Legislature of the state of
5 New York, passed an act creating the defendant a body corporate "for the purpose of erecting and maintaining a bridge, for the purposes of rail road travel and transportation across the Hudson river," from shore to shore, at Albany, from some point, to be fixed by commissioners for that purpose named in the act (§1).

Section 2 fixes the capital stock at $500,000, with au-
6 thority to rail road corporations to subscribe for the same, under certain limitations.

Section 3 names fourteen commissioners, to receive subscriptions to stock, and to apportion it among the subscribers.

Section 4 provides, that as soon as the capital stock shall be subscribed for, the commissioners shall give fifteen days'
7 notice of their intention to locate the bridge, and shall proceed to locate it, and make and file a certificate of such location with the Clerk of the County of Albany, and shall thereupon give notice of the first election of directors of said corporation.

Section 5 confers upon the commissioners, power to make all surveys and examinations, to enable them to select the
8 most advantageous site for the bridge, and appoint all engineers and agents for that purpose.

Sections 6 and 7 regulate the number of directors and the future elections, with sundry provisions touching officers and agents, calls upon stock, etc., etc.

Section 8 provides that the bridge shall be erected at an
9 elevation of at least 20 feet above common tide water, so as to allow under it the free passage of canal boats and

2773

barges, without masts, with a draw of sufficient width to admit the free passage of the largest vessels navigating the river, and at least 200 feet wide—or two draws of at least 150 feet each; which draws are not to be obstructed by piers or otherwise, and in such a manner as to cause no substantial impediment or obstruction to the free navigation of said river.

(*By an act of April* 14, 1857, *the original act is so far amended as to allow one draw of* 180 *feet, or two of* 110 *feet each, in clear width, if the State Engineer of New York. and J. B. Jervis and O. H. Lee shall determine such width sufficient to admit the free passage of the largest vessel navigating the river. Pursuant to this amended act, the engineers named, made and filed a certificate, that one draw of* 180 *feet, or two of* 110 *each, clear width, was sufficient*).

Section 8 further provides that the Bridge Company shall at all times, during the season of navigation, cause the draw to be opened, and kept open, except for the passage of rail road trains of cars, and shut whenever the same may be necessary.

Boats and vessels wishing to pass the draw, shall at all times have preference over rail road trains.

Such draw shall be promptly opened to any boat or vessel on signal, if given before any rail road train shall have appeared and given signal of its intention to pass.

The Bridge Company are at all times to keep in readiness one or more steam boats or steam tugs, suitable for towing vessels through the draw; and shall tow all sail vessels through the draw, whenever requested to do so by the masters of the vessels, on their regular passage up and down the river, without charge; and shall afford such other facilities as may, in the judgment of the Canal Board be requisite, in passing the draw without hindrance and delay.

For any unnecessary delay, or refusal in opening and shutting the draw, the Bridge Company are made liable in treble damages to any party aggrieved.

From sundown to sunrise, during the season of naviga-

tion, suitable lights are to be maintained on the bridge, and for any neglect the company are made liable in damages.

Section 9 provides that the Bridge Company shall not
15 suffer any bars or obstructions which may be formed by reason of the bridge or piers thereof, to remain in the river, so as at any time to hinder or impede the free navigation thereof; and for any neglect in this respect, a penalty of $500 is imposed to the people of the state, together with all damages to any party aggrieved.

Section 10 authorizes the company to take and hold all
16 real estate necessary for the erection of the bridge and piers, etc., etc., and the approaches thereto, and may occupy the bed of the river for piers, &c.

Section 11 regulates the manner by which real estate for the use of the company may be acquired.

Section 12 provides, that after the completion of the bridge, tolls may be collected for crossing the same, on foot
17 and with wagons, cars or carriages of any kind, and with horses or other animals, as the directors may from time to time establish, subject to the approval of the Canal Board. The tolls to be so regulated, that they shall not yield an income to exceed 10 per cent.

Section 13 imposes a penalty for any willful injury to the bridge or its appurtenances.

Section 14 regulates the personal liability of stockhold-
18 ers and directors for debts.

Section 15 confers upon the Bridge Company the general powers, and subjects it to the liabilities regulated by the Revised Statutes.

Section 16 authorizes any rail road corporation, whose road has or shall have a terminus at, or shall run its trains to or from Albany, or East Albany, or shall run its trains in connection with any road having such terminus, shall be
19 permitted to use the bridge for rail road purposes, upon such terms as the directors of the several companies interested may agree, and if they can not agree, the terms shall be fixed by the Canal Board.

In pursuance of this act, the commissioners named therein, met at Albany, June 25, 1856, and received subscriptions to the whole capital stock of $500,000. And on the 21st of August, 1856, the commissioners located the bridge 20
on the Albany side at the foot of Exchange street, and on the easterly side at a point on the easterly branch of the river, known as Van Rensselaer's creek, 255 feet southerly from the centre of Partition street, in the village of Greenbush.

The bridge to cross the main channel by a straight line, nearly at right angles thereto, and to be connected with the fixed point on either side of the river by suitable curved 21
approaches.

The certificate of this determination was duly filed on the 21st day of August, 1856, and the company was completely organized by the election of directors on the 24th day of September, 1856.

On the 17th of October, 1856, the bills in these causes were filed and served; with a notice of motion for a pre- 22
liminary injunction according to the prayer thereof.

In the suit in which Silliman is complainant, it is alleged that he is a resident of Troy, N. Y., and is the part owner of seven barges, which are duly enrolled and licensed under the act of Congress, at Troy, which is a port of delivery.

That such vessels have been and are regularly engaged in navigating the Hudson river between Troy, Albany and 23
New York, and in carrying on the coasting trade between said ports, and that it is intended to continue such business.

That Silliman has resided in Troy 30 years, during which time he has been concerned in the navigation of the Hudson river between Troy and New York.

That he is engaged in business in Troy, dependent for ts prosperity upon the unobstructed navigation of the Hudson. 24
That he owns considerable property in Troy, the value of which will be greatly impaired by any permanent obstruction to the commerce and navigation of the river.

In the suit in which Coleman is complainant, it is alleged that he is a resident of Barnstable, in the state of Massachusetts. That he is the part owner and master of a
25 schooner called the "Vintage," which, on the 10th of March, 1856, was duly enrolled and licensed at Barnstable, to carry on the coasting trade. That since such enrollment the vessel has been engaged in the coasting trade between Barnstable and Albany and Troy, and intermediate places, and the ports of Boston and various other ports and places in the United States. That with said vessel he has been
26 accustomed to navigate the Hudson from its mouth to Troy, in the transportation of merchandise, and that he intends to continue such business.

With the difference above noticed, the allegations of both bills are in substance the same, and are as follows:

That the city of Albany is a port of delivery, situated upon the west bank of the Hudson, about six miles below Troy, and that the tide ebbs and flows up to and within the
27 city of Troy.

It is then alleged that the defendant became duly organized as a corporation, and the site of the bridge located by the commissioners, and the certificate of the commissioners is set out, *verbatim*.

It is further alleged that the defendant is making preparation and threatens and intends to erect said bridge across
28 the river, upon massive stone piers, several of which are to be about twenty feet in breadth, and placed in the main channel of the river, in the ordinary and necessary course of commerce and navigation. That at least two of the piers upon which the draw is to operate, must be of larger dimensions than the others—and that the defendant does not intend to elevate the bridge materially or any more than
29 20 feet above common tide, and charges that defendant threatens and intends to erect the bridge at an elevation of not more than 20 feet above common tide, and not sufficiently elevated above the stream as to admit the passage there-

under of steamers, masted vessels and tows daily accustomed to pass.

It is then averred that the erection and maintenance of the Bridge in the manner intended and threatened, will es- 30
sentially obstruct the navigation of the river—hinder navigators—increase the hazard and expense of navigating the river—derange and diminish trade and commerce—and operate as a common nuisance.

It is further alleged that the bed of the Hudson at, above and below the site of the bridge and between Troy and Al- 31
bany, is of light unstable sand, which is moved by the slightest action of the water, and by its irregular deposits yearly interrupts and changes the channel of the river at the places aforesaid.

That the river at Albany and its vicinity is subject to heavy annual freshets, which disturb and vary the channel. 32

That at the opening of the river in the spring immense and dangerous ice dams are formed at or near Albany, which interrupts the flow of the river in its ordinary channel, and create great alterations in the bed of the stream.

That for many years, the city of Troy has for much of each year, employed a steam dredge in clearing and pre- 33
serving the channel between Troy and Albany, from the changes and obstructions caused as alleged.

That the effect of said bridge, and its piers and foundations, will be to fill the channel with sand bars, and make the same intricate and fluctuating beyond the possibility of avoidance or reformation by the means indicated in the act 34
authorizing the bridge, so as to prevent a destructive interruption of commerce and navigation.

It is further alleged that the government of the United States, influenced by the commercial and national importance of the river, and possessing an extensive and costly fortification and arsenal located on the banks of the stream 35
opposite Troy, has from time to time made large appropriations for the improvements of its navigation, and several hundred thousand dollars have been recently expended for

that purpose between Troy and Albany, and above the site of the bridge.

It is also stated that Troy contains a population of nearly
36 40,000, and maintains manufacturing enterprises of *unusual* extent and importance, and conducts a commerce of *great variety, expansion and prosperity.*

That West Troy and Green Island, opposite Troy, contains a population of about 7000, and employ a large capital in manufactories and the lumber trade, and the commerce incident thereto.

37 That the Erie and Champlain canal unite with the river at West Troy, and a large proportion of the products arriving at tide water by canal, are there locked into the river, and the bridge crosses the Canal basin at Albany, below the outlet of said canals.

And it is charged that the erection and maintenance of said bridge will inflict great injury upon each and every of these interests.

38 It is further alleged, that the full breadth of the river opposite Albany is inadequate to the accomodation of the commerce and navigation conducted at and passing that locality.

That the contemplated enlargement of the Erie canal, the rapid increase in the population of the western states and in the facilities of transportation, must magnify the
39 vast trade which touches tide water at Troy and Albany, and passes upon the Hudson to the sea board, and that the erection of the bridge across the river and placing piers therein, will incommode trade, diminish its extent and increase the hazard and expenses of its prosecution.

That the precautionary measures provided by the act, professing to divert and diminish the injury to navigation,
40 will prove insufficient to protect it from injury.

That the construction of any form of draw bridge at Albany is impracticable, without material obstruction to navigation.

That there is no public necessity for a bridge at Albany

2779

That general and local commerce, trade and travel are fully accommodated by existing facilities, and if not, it is entirely unnecessary to inflict upon Troy the apprehended injury. 41

A decree is then prayed for, to the effect that the act of the Legislature of New York, authorizing the construction of the bridge, is unconstitutional and void, and that the defendant may be perpetually enjoined from erecting any bridge, under the authority of such legislative act.

The answer of the defendant puts in issue every material allegation of the bill of complaint (except formal averments), 42 and avers, among other things, that the tides in the river at Troy and above Albany, are very inconsiderable, and do not ordinarily raise the waters above 10 or 12 inches.

It denies that the defendant threatens or intends to erect the bridge in the manner charged in the bill, and avers that it has not determined upon any precise plan, nor the number or size of piers, nor the extent of its elevation above 43 common tide; but that it does not intend to erect any bridge except strictly pursuant to its charter and which shall not materially obstruct navigation.

That it has not threatened and does not intend to erect a bridge at an elevation of not more than 20 feet above common tide, or one not of the elevation required by its charter; and it is averred that a bridge erected according 44 to its charter, will enable some of the steamers and all barges without masts navigating the river, to pass under, and others can pass through the draws, without any material impediment or obstruction.

It is admitted that between Albany and Troy, considerably above the site of the bridge, the bed of the river is of light, unstable sand, easily disturbed by the action of the water, and from this cause, at points removed from the in- 45 fluence of a bridge, the navigation is often interrupted.

It is also admitted that the river at Albany and vicinity, is subject to annual freshets, by which the channel in some parts is disturbed, but that at Albany, and for the space of

two miles in front of the city, about midway of which the bridge is located, the channel of the river is not disturbed in any material degree, by any of the causes mentioned.

46 That at Albany no ice dams are formed which alter the bed or channel of the river. Such occurrences are occasional, and at points in the river entirely beyond the influence of a bridge.

It is also admitted that for many years Troy has, for much of the year, employed a dredge in clearing and preserving the channel between Troy and Albany. That the channel of the river above Bath, and between it and Troy, is very

47 narrow, devious and uncertain; that sand bars form at every considerable freshet, so that no navigation would be practicable but for the constant employment of the dredge in the removal of sand bars, and it is by means of the use thereof that the commerce of Troy is passed.

The answers substantially put in issue the allegations of the bill touching the action of the government of the United

48 States, in respect to the Hudson river above Albany. It admits the location of an arsenal at West Troy, and that money has been expended in the attempt to improve the navigation, but that the works commenced for that object, were abandoned in an incomplete state, and suffered to go to decay.

In respect to the manufacturing and commercial import-

49 ance of Troy, West Troy and Green island, the allegations of the bill are put in issue.

It is denied that the channel of the river at Albany is inadequate to the accommodation of the commerce at that point, and avers that the bridge erected pursuant to the charter with the facilities provided for, will not in any respect interfere with any existing right of navigation.

50 It is denied that no necessity for a bridge at Albany exists, and alleges that the proper accommodations of travel and of the internal trade of the state, demand the erection and maintainance of a bridge at Albany, and that by its

2781

erection and maintenance no material injury will be inflicted upon interests connected with the Hudson river.

It is submitted that the act of the Legislature authorizing the bridge, is constitutional and valid, and was a measure 51
of public necessity; and that it is within the power of the legislature of New York to authorize the construction of a bridge across the Hudson river at Albany for the convenience of its land commerce and travel, and that the complainants have no such exclusive rights in the waters of the Hudson, as entitle them to prevent other citizens from crossing, by means of a proper bridge.

It is denied that the complainants have any such interest 52
in the Hudson river as entitles him or them to maintain his bill, or to any relief whatever, and the defendant prays to be hence dismissed, &c., &c.

The complainants filed a general replication to the answer in each cause, and thereafter testimony was taken before commissioners.

A motion for a preliminary injunction was argued before 53
Mr. Justice Nelson, Nov. 17, 1856, and on the 25th day of July, 1857, a preliminary injunction was granted pursuant to the prayer of the bill.

On the 14th of April, 1857, the Legislature of New York passed an act to the effect, that the Bridge Company, instead of constructing their bridge with draws of the dimensions prescribed in the act of 1856, may construct 54
said bridge with a draw of such dimensions as the state engineer of New York, J. B. Jervis and O. H. Lee, civil engineers, or a majority shall determine, of sufficient width to admit the free passage of the largest vessels navigating the Hudson, and at least 180 feet in width, or with two draws of 110 feet each in clear width.

The engineers named in this act filed their determination 55
to the effect, that the bridge might be constructed with one draw of 180 feet wide, or with two of at least 110 feet clear width.

By stipulation, this act and the determination under it, is

to be regarded and treated as if formally made a part of the pleadings, or brought before the court on supplemental bill.

The testimony although taken in one case, is by stipulation agreed to be used in both cases, with the like effect as
56 if taken in both.

The points of disagreement between the judges of the Circuit Court appear in the record and are in substance: 1. Whether under the constitution and laws of the United States, the court has power to perpetually restrain the erection of a bridge at Albany, which is fully authorized by the Legislature of the state of New York. 2. Whether
57 upon the evidence it appears that the proposed bridge will materially hinder and delay vessels in navigating the river. And, 3d Whether if the proposed bridge shall prove injurious to the plaintiffs they have not an adequate remedy at law.

SECOND—Facts in relation to the Hudson River at Albany
58 **and vicinity, in respect to width, current, channel, bed, etc., etc.**

At Albany and for a distance of about two miles, the river is from 800 to 1000 feet wide, with a channel embracing nearly its entire width.

The current is direct and uniform. In low water the
59 velocity of the current is about eight-tenths of a mile per hour. In ordinary freshets, about two and eight-tenths miles per hour, and in the highest freshets about four miles per hour.

The surface velocities in each case are about one-tenth greater.

60 Page 82, Defendant's Depositions, fol. 406.
Page 86, Defendant's Depositions, fol. 427.

The bridge is located at about the middle of this wide and uniform channel, and may be seen by vessels approaching

it in either direction, at a distance of at least from one mile and a half to two miles.

Defendant's Depositions, page 84, fol. 441.
" " 168, fol. 830. 61
" " 189, fol. 931.
" " 196, fol. 961.

The bridge crosses the river at right angles with the current. Nearly the whole width of river in front of Albany and for a mile either way, affords sufficient water at ordinary stages for navigation.

Defendant's Depositions (Evidence of Dearstyne), pages 325, 62
327, fol. 1605.

On the west side of the river, at Albany, is a continuous line of docking for about the distance of two miles and a mile below the site of the bridge, and on the east side there is a parallel line of docks extending about one mile, and to a point below the site of the bridge.

By the erection of these docks, and some dredging on the 63
easterly shore in few instances, all tendency, at or about Albany, to the creation of sand bars, has disappeared and the channel is free from impediments.

The bed of the river is sandy and gravelly in its character, resting on a strata of blue clay, but for many years no sand bars have formed in front of the city, nor are any apprehended. 64

Below the village of Bath, and about one mile above the site of the bridge, about one-tenth of the water of the river deflects eastward, forming Van Rensselaer's creek, which again unites with the main channel near the village of Greenbush, below the bridge site. Upon the island formed by the Van Rensselaer creek and the main channel, the depots of the Western and Hudson River rail roads are lo- 65
cated, and between these depots, the easterly end of the bridge over the main channel is located.

On the west side of the river, below Bath, there is an opening in the Albany pier, which admits about the same

quantity of water into the Albany basin, as Van Rensselaer creek. The water from this basin discharges into the river
66 below Hamilton street and below the bridge.

Vide George E. Gray's Map.
Deposition of McAlpine, page 86, of Defendant's Depositions.

The obvious effect of the confinement of the waterway at Albany, by means of the uniform lines of docking upon either side, is to preserve the uniformity and directness of the currents at all stages of water. They operate in all
67 respects as the dykes erected in the various attempts to improve the channel of the river at other places, and preserve it from any tendency to the creation of sand bars, which are so common above, as well as to a considerable extent below Albany.

Vessels at Albany are in no danger of grounding, and no dredging is required to keep the channel open; and there is nothing in the condition of the river, its currents and
68 channel at this point, which furnishes any reasonable ground for the apprehension that the piers of a bridge, properly constructed, will tend to the creation of any sand bars that will in the slightest degree affect navigation.

Defendant's Depositions, Evidence of McAlpine, page 86.
" " " Morris, page 358.
" " " Johnson, page 400.

Nor is there any ground for the apprehension that the
69 erection of piers will tend to the formation of ice dams at Albany. On the contrary, all reliable opinions as well as experience, at places more exposed to accidents of this kind than Albany, tends to show that the piers of a bridge, with proper ice breakers, will operate to facilitate the passage of ice down the river rather than obstruct its passage.

Defendant's Dep. (E. F. Johnson), pages 86, 358, 400.

70 Besides, the damming up of ice at Albany has never occurred to any such extent as to affect the channel or bed of the stream.

In the devious and narrow channels, above and below, this result has been produced.

Ice dams have not formed at the Troy bridge. 71

It is only in shoal water that ice dams usually form, and if they do form in deep water, they do not affect or disturb the channel.

Above Bath, and between that point and Troy, the river is not navigable, except made so by the use of artificial means. It is filled with shoals, and its channel is narrow, crooked, and constantly shifting. This is the uniform testimony of all the witnesses on both sides. 72

It is thus described by Mr. McAlpine (defendant's depositions, page 88): "It is a very crooked and narrow channel in most places; I have frequently passed up it between Troy and Albany; it is subject to being filled by bars at almost every freshet, requiring annually to be removed by dredging; I think the channel is about 200 feet, and somewhat less in narrow places; the depth of water in these shallow places is from five to seven feet in low 73 water."

Philip P. Staats, navigator, says (defendant's depositions, page 161): "In ordinary times the channel is very narrow, with about seven feet of water; and in such times with a vessel drawing seven and eight feet of water, you can not pass a tow on the river except at certain places, and have to hold back for them to pass." And at page 171 (fol. 845), he says that the navigation between Troy and 74 Albany has, for the last few years, been kept open by the use of dredging machines.

Henry Bedell, pilot (deft's depositions, page 178, fol. 877), names several shallow and narrow places between Albany and Troy, and adds, "at these places, if you meet anything of a tow, you have to wait until the tow passes." At fol. 878, he says the navigation is kept open by means of a dredging machine (vide also pages 179, 181, 182). 75

William J. Ensign, pilot of the steamer New World

(deft's depositions, page 194, fol. 950), names the Fish-house bar and Kellogg shoals as some of the narrowest places, and says: "if there is a vessel of any kind lying in
76 the channel at these points, drawing any amount of water, it is difficult to pass it."

At fol. 951, he says that tows or vessels of more than fifty feet width, in ordinary water, find difficulty in passing each other at these places.

WILLIAM H. MASTIN, mariner (deft's depositions, pages 205, 206, fols. 1008–9), says: "the navigation between Troy and Albany is maintained by dredging, and that ves-
77 sels are frequently aground there."

EDMUND ELLIS, pilot, gives evidence to the same effect.

Defendant's Depositions, pages 211 to 214, fols. 1031, 1033, 1037, 1043, 1047, 1048.

And to the same effect is the evidence of HENRY LEWIS, pilot.

Defendant's Depositions, page 216, fols. 1058 to 1063; page
78 219, fol. 1071.

HIRAM WHEELER, navigator (page 232, fols. 1126 to 1128).

LAWRENCE DEARSTYNE, ferry pilot at Albany (pages 324–25, fols. 1590–91).

The witnesses produced on the part of the complainants, generally concur in the evidence given by defendant in respect to navigation between Albany and Troy.

79 By a report of Major Delafield, of the United States Army, made to the War Department, under date of May 25th, 1853, produced in evidence on part of the complainants (complainants' depositions, pages 528 to 674), there is given a detailed statement of various shoals between Troy and Albany (pages 644 to 646), and the various stages of water during the years 1819, 1831, 1838, 1843 and 1852.

In 1825, a dredging machine was required to be used on
80 Van Buren's bar.

Complainants' Dep., page 637, fol. 3081.

From 1829 to 1831, "the Corporation of the city of Troy finding it necessary absolutely to resort to some means to secure a navigation to their city, caused dredging to be made on the shoals in the river, and expended, between 1829 and 81
1831, the sum of $5000 between Troy and Albany."

Delafield's Report, Comp. Depositions, page 637, fol. 3082.

At page 641, complainants' depositions, Delafield's report states that in 1851 a steam dredging machine had been purchased by the corporation of Troy, to be ready at any time to remove the shoals so frequently forming in the channel between Troy and Albany. The charge of this appa- 82
ratus was put in the hands of Capt. Smalley, who makes his home, in a great measure, on board the machine vessel, has it always in order for the moment necessity calls for its use, and by whose energy in its application, *Troy has continued to secure to herself a navigation which otherwise she could not have had.*

Complainants' Depositions, page 641, fols. 3103, 3104.

83

Alfred Mosher, a witness for complainants (complainants' dep., page 83, fol. 341), says: "I am acquainted with the channel of the Hudson river between Troy and Albany, *and the narrow places in it are too many to mention.*" Vessels are obliged to wait for each other in passing these places (fol. 342).

At some of the places the channel is about 150 feet wide and five feet deep (fols. 345, 347, 348, 349). 84

Fish house bar has about 100 feet width of channel, in the best of water and sometimes five feet deep (vide ev. of Mosher, pages 84 and 88).

So imperfect and difficult is the navigation between Troy and Albany that the tows from Troy and West Troy start down the river at the right time of the tide in order to get over the shoal places. 85

Ev. of Mosher, Complainants' Dep., page 89, fol. 374.
" " " page 123, fol. 518.

HENRY HAYWOOD, a witness for complainants (complainants' dep., page 136, fol. 573), says that at low water, navigation between Troy and Albany would be difficult, if
86 not impossible, without dredging.

Every witness interrogated on the subject agrees to the fact that navigation between Troy and Albany is imperfect and uncertain. That in sailing from Troy reference is had to the state of the tide; that vessels frequently ground; and, substantially, that without dredging no navigation could be maintained.

87 It is true also that the channel of the river for some distance below Albany is imperfect, but much better than above Albany.

Complainants' Depositions, page 330.

With the exception of the great bar at Castleton, formed by an ice dam in the springs of 1851–2, no great amount of
88 dredging is required to preserve navigation.

The general course of business indicates the difference between the channel above and below the bridge; it being clear that the large tows which pass down from Albany, without material difficulty or delay, could not be navigated in ordinary water between Troy and Albany.

With the exception of some unusual and extraordinary occurrence, such as the formation of the great bar in
89 1851–2, the amount of dredging to maintain navigation below Albany is comparatively trifling. Major Delafield (comp'ts evidence, page 642, folios 3106, 3107), says, that from 1845 to 1852, no dredging below Albany had been done.

In 1852, Mr. McAlpine, as State Engineer, excavated 45,636 cubic yards from Castleton bar, and 16,972 cubic
90 yards from Cuyler's bar.

During the same time Captain Smalley excavated 25,000 yards of sand from a bar at the head of Mr. Van Buren's island, and 18,000 cubic yards from Washington bar. Afterwards, during same year, much was excavated at Kel-

2789

logg shoals, Covell's folly, Round shoals, and on Washington bar.

It appears also that the channel below Albany is, as a 91
general thing, considerably wider than between Albany and Troy. It is nevertheless an imperfect navigation. Sand bars do form and obstruct the channel, and vessels in low water frequently ground.

See Defendant's Depositions, page 88.

Both above and below Albany, vessels and tows are, in 92
ordinary water, required to pass devious and undefined channels, not wider than the draw openings of the bridge

At Troy the state dam crosses the river. In this dam is a lock about 30 feet wide and 100 feet long, and through it vessels pass to and from Lansingburgh and Waterford and Troy, and canal boats from the Champlain canal, lock into the river, at Waterford, and pass through the lock in 93
the state dam down the river, and return north by the same route.

At West Troy, opposite the city of Troy, there is a side cut from the canals through which boats pass from the canal into the river, and from the river into the canal. At Port Schuyler, about one and a half miles below, there is another side cut used for the like purpose. 94

Complainants' Depositions, page 327, fol. 1464.

The river at and above Albany is subject to freshets. The spring freshets usually occur in March and April (compts. dep., page 119). Sometimes one in May. The fall freshets usually occur in October and November.

Complainants' Depositions, pages 152-3, fols. 650, 651.

The spring freshets usually occur before navigation be- 95
gins, and during the very high water there is and can be no navigation of the river.

The moderately high water from the spring floods continues from two to six weeks, in the months of March and April.

There are sometimes light floods during the summer, of small importance.

There are also fall freshets, but they are of short duration,
96 and do not ordinarily interfere with navigation.

THIRD—Facts in relation to the navigation at and above Albany; its kind, character, extent; the number and kind of vessels passing at different points, &c., &c.

The vessels which navigate the river at Albany, consist
97 of steam boats, schooners, sloops, propellers, barges and canal boats.

The largest class of vessels which come to Albany are the passenger steamers, and they land considerably below the bridge.

The largest vessels which go above Albany are the Troy passage steamers—the Francis Skiddy, Rip Van Winkle and Commodore. The Skiddy is of these the largest ves-
98 sel, and is 325 feet long and about 70 feet wide, and from 45 to 50 feet high above water to the top of her wheel house.

Complainants' Dep., page 245, fol. 1080.

Most of the navigation above Albany is conducted by towing. All laden vessels passing between Albany and Troy are towed up and down by small steamers averaging
99 from 80 to 100 feet long and about 30 wide.

Defendant's Dep., page 163, fol. 804.

Much the largest amount of business on the river above and at Albany is done by means of barges and canal boats towed by small steamers. The number of canal boats greatly exceed the number of barges.

Complainants' Dep. (H. Swarthout's), page 139, fol. 771.

100 The canal boats pass into the river at Troy, and without breaking bulk, are towed to Albany by small tugs, and then attached to larger tows and pass on to New York. Some

canal boats break bulk at Troy and Albany, and some pass into the river at Albany, and pass on to New York.

The size and capacity of canal boats is now greater than formerly. They now carry about 120 to 150 tons, and on the river are now taking the place of barges. 101

Complainants' Evidence, page 207, fol. 903; page 224, fol. 981–2; page 336, fol. 1504; page 527, fol. 6059.

Sail vessels are decreasing at and above Albany very fast. Barges are also decreasing, and the enlarged canal boats are taking their places. 102

Deft's Evidence, page 170, fols. 839, 840; page 188, fol. 930; page 195, fols. 955, 957; page 205, fols. 1006–7; page 207, fol. 1014; page 212, fol. 1038; page 219, fol. 1071; page 324, fol. 1587.

Complainants' Evidence, page 551, fol. 2578.

The only steam boats running above Albany not engaged in the business of towing, are the three Troy passenger boats, forming together one evening line between Troy and New York. 103

The average number of passengers carried by this line for the seasons of 1856 and 1857 was about 135 daily.

Defendants' Evidence, page 298, fol. 1459.

The capacity of these boats are about one-third greater than is necessary to accommodate the business. 104

Defendant's Evidence, page 299, fol. 1463.

The number of steamers and the amount of passenger business from Troy has decreased since 1845.

Complainant's Dep., pages 263, 264.

The number of vessels and steamers (not including canal boats) leaving Troy and West Troy daily during the season of navigation for places below Albany, is estimated at twenty-five. 105

Complainants' Dep., page 86, fol. 356.

The wood work of most of the steam vessels towing at and above Albany is low enough to enable them to pass

under the bridge, if their smoke pipes were so arranged as to let down, and they may be so arranged with little difficulty and at small expense.

106 Complainants' Depositions, page 91, fol. 383.
" " page 92, fol. 384.
" " (Robinson) page 237, fol. 1042.
" " (Oliver) page 283, fol. 1253.

It is estimated that there are 40 or 50 barges regularly engaged in the lumber business at West Troy, and some sail vessels—about 1-20th of the business is done in sail vessels.

107 Complainants' Depositions, page 105, fol. 443.
" " page 315, fol. 1403.

From one-half to two-thirds of the vessels towed between Troy and Albany and below are canal boats.

Complainants' Dep., (S. Betts) page 121, fol. 508.
" " (N. H. Noyes) page 152, fol. 646.
" " (R. Robinson) page 224, fol. 981.
108 " " (J. Oliver) p.284, 295, fols.1258,1310.
" " (J. R. Getty) page 319, fol. 1427.

There is considerable freighting business between Waterford, Lansingburgh and New York, done in barges.

Complainants' Dep. (H. Swartwout), page 159, fol. 681.

The largest portion of freight from the Champlain canal, coming to Troy, enters the river at Waterford, and passes the sloop lock at the state dam and under the Troy bridge. The distance by canal to Troy, where they can lock into the river below the Troy bridge, is about the same.

109 Complainants' Depositions (H. Swartwout), page 171, fol. 738.

The ordinary height of barges above the water when loaded, is from two to four feet; when light, from six to seven feet; their upper works (including pilot house), when laden, is from 15 to 20 feet above water.

110 Complainants' Depositions (Swartwout), page 188, 190.

The principal freight coming from Troy comes from the canals, all of which can be passed through the canal to Albany and through the basin into the river below the bridge.

The daily arrivals of canal boats at Troy is about 40. They are increasing in size and tonnage. 111

Complainants' Depositions (Capt. Getty), page 334-5, fol. 1501 to 1504.

The extent of the commerce of Troy, as given by Mr. Hazard (complainants' depositions, page 338 to 341), is as follows:

(Owned at Troy) 4 sail vessels (3 sloops and 1 schooner), 39 barges, 2 propellers, 2 passenger steamboats. 112

Troy and Philadelphia line: 2 propellers and 8 barges.

Troy and Newburgh line: 1 propeller.

Troy and Boston line: 10 schooners, regular; 49 schooners, 9 sloops, 8 barges, transient.

350 transient vessels (estimated).

This statement is inflated and unreliable. It is mainly the result of conjecture, and not founded on personal knowledge. 113

See cross-examination of H. W. Hazard, page 344, et seq.

The result of a season's business of the 4 sail vessels, 39 barges and 2 propellers, owned at Troy, is put down in "Recapitulation" (page 340), at 621,460 tons of freight.

This business (as Hazard says), is conducted by *four* different firms (page 361, fol. 1635). 114

The amount estimated as carried by Silliman, Matthews & Co. for 1856 (which was the best business they ever had, twice as great as in 1857, page 348, fols. 1569, 1570), was below 101,648 tons (see page 337, fol. 1515), and the business of this firm is estimated as about equal to the others (page 361, fol. 1636). 115

Taking this estimate upon Mr. Hazard's own basis, the whole amount of tonnage would not exceed 400,000 tons,

per season in fact, as against 621,460 tons stated in his recapitulation.

116 But as against the accuracy of Hazard's statement and testimony, there is the evidence of Thos. A. Tillinghast, one of the Troy firms.

He says (page 97, fol. 409), that there are *four* heavy forwarding houses at Troy and *West Troy* (Mr. Hazard has *four* at Troy *alone*), and their names are Betts, West Troy, Silliman, Matthews & Co., E. C. Patterson & Co. and T. A. 117 Tillinghast & Co. of East Troy (page 98, fol. 410).

Mr. Tillinghast says the *largest* business is done by the three East Troy firms, and their business is almost equal (page 105, fol. 444), and the business of his firm for 1856 he puts at about 100,000 tons (page 107, fol. 452).

Upon this testimony the result of a season's business with the vessels owned at Troy, would be about 300,000 tons, *or less than one-half* in Mr. Hazard's "Recapitulation."

118 And the year 1856 was the largest business ever done at Troy, and more by one half than in 1857.

Mr. Betts of West Troy, although sworn as a witness for complainants (pages 108 to 128), was not interrogated as to the extent of his business.

The two passenger steam boats are put down in "Recapitulation" at 200 passages each and 400 for both, 119 and carrying 80,000 tons of freight during a season (see fols. 1531, 1532).

According to the evidence of Capt. Smith, of the Skiddy (comp'ts depositions, page 258, fol. 1135), the passenger boats do not carry on the average during the season, at each passage, to exceed 100 tons of freight.

For the 400 passages put down in recapitulation, this will make only 40,000 tons per season, in fact, as against 120 Mr. Hazard's estimate of 80,000 tons.

The result of a season's business of the *Troy and Philadelphia line* (fol. 1531), is put down by Mr. Hazard at a total of 68,480 tons.

David Mann, complainants' witness, the agent of this line

at Troy, says (page 300, fol. 1330), that this line carries annually about 18,000 tons of freight, being over 50,000 tons less than Mr. Hazard's estimate.

121 The business of A. D. Agan & Co., Troy and Boston line, per season, is put down in Mr. Hazard's statement at 86,730 tons (fol. 1532), and passages of vessels 551, for the season of 240 days.

Mr. Hazard has no personal knowledge of this business (fol. 1564).

122 To carry the amount of freight estimated, would require *about twenty vessels each week*, during the entire season, each carrying *about* 160 *tons.*

Mr. Agan, agent of this line, says, he *can not state the average number* of vessels engaged for him *per week*, sometimes *fourteen* or *fifteen per week* and sometimes *only three or four* (complainants' depositions, page 527, fol. 6059), and his vessels carry on the average about 150 tons, being of the tonnage of the enlarged canal boat.

123 Mr. Agan does not *claim over sixty vessels engaged* in his line (page 515, fol. 6000, but Mr. Hazard gives him seventy-six.

It is obvious that Mr. Hazard has estimated the eastern business double what it should be.

In his "Recapitulation" Mr. Hazard adds, "for transient vessels bringing coal and iron to this port, estimate 350 vessels, carrying 105,000 tons.

124 In respect to this item, Mr. Hazard thus speaks for himself (page 346, fol. 1561).

"38 *Question.*—Do you know that the transient vessels stated in your recapitulation, made 350 trips or 700 passages to and from Troy in A. D. 1857?

"*Answer.—I do not;* they are estimated in the recapitulation, *but I think they are estimated low.*

125 "39 *Question.*—How do you know they are estimated low?

"*Answer.—From the quantities of coal, &c., received here, as given by the proprietors of the several yards here.*

"40 *Question.*—What amount of coal and iron was received at Troy during the year 1857 ?

126 "*Answer.*—*I do not know.*"

The statement presented by Mr. Hazard is not sustained by any other witness.

There is no statement given in detail of the extent or number of vessels engaged in business at West Troy, Lansingburgh and Waterford.

The West Troy business, in the opinion of one or two witnesses, employs forty or fifty barges and some sail ves-
127 sels—one-twentieth of the business being done by sail vessels; but this estimate is no doubt inflated, for having the means to arrive at the accurate number, the complainants rather repose on the mere estimates of interested and prejudiced witnesses.

Vessels propelled by sail, and doing business at or above Albany, are substantially obsolete.

128 Comp'ts Dep. (Ev. J. A. Durnou), page 551, fol. 2578.

More than one-half of such as continue in business, are towed to and from Troy in the same manner as barges and canal boats.

The principal freighting business between Troy, Albany, and New York, is done in barges and canal boats and towed by steamers. There are now about four canal boats em-
129 ployed to one barge, and canal boats are increasing while barges decrease.

The average number of boats towed at a time in ordinary water, between Troy and Albany, is about three or four. They sometimes take only one, and occasionally five or six; and in extreme cases as high as eight.

Complainants' Dep., page 542, fol. 2817.

130 This towing is done by a small class of steamers.

At Albany large tows are made up for New York, and taken by a larger class of steamers. The number of boats comprising a single New York tow vary from fifteen or

twenty to forty, principally barges and canal boats, much the largest proportion being canal boats.

Ev. of T. A. Tillinghast, Complainants' Dep. page 99.
Complainants' Dep., page 179, fol. 773.

131

Three lines of tows leave Albany for New York daily during the season of navigation. Two of these lines make up their tows above the opening in the Albany pier, and one below, all being above the site of the bridge.

Complainants' Dep., page 96.
Defendant's Dep., pages 163, 164, 165.

132

There is room for making them up below the bridge, as well as above.

Above the bridge, and in the upper part of the city, the lumber business at Albany is conducted.

Complainants' Dep., page 96.

Below Exchange street the passage steamers, boats from ports on the river below and eastern ports, and boats engaged in coal business, have their docks.

133

Complainants' Dep., pages 102, 103.

Between Troy and New York rafts of timber are navigated during the season of navigation. This timber comes from the north and west, and at Troy is made up into large rafts and floated with the tide, or towed to New York by steamers.

134

The width of these rafts vary from 100 to 200 feet, and from 300 to 600 feet long. It is estimated that from twenty to forty rafts per season pass down the river.

Complainants' Dep., pages 124, 139, 151, 163, 422 to 428.

These rafts have no upper works, and may as easily pass under a bridge as any part of the river. Besides, they do not sail under a coasting license.

135

The great business of the river at and above Albany, in the movement of freight, depends upon the state canals. The commercial business of Troy and West Troy would

practically cease if the lock at Waterford, and the side cuts at West Troy and Port Schuyler were closed.

136 The Troy and West Troy barges are mainly employed in the transportation of canal freights transhipped at Troy and West Troy.

Complainants' Dep. (Ev. of Getty), page 334, fol. 1501.
" " (Ev. of Hazard), pages 343, 344.

More than one-half of the freights of the Troy and Eastern line of barges come from the state canals.

Complainants' Dep. (Ev. of Agan), page 527, fol. 6058.
137 " " " " page 517, fol. 6006.

The entire lumber business of Troy and West Troy, and Albany, depends upon the canals.

Complainants' Dep., page 348, fol. 1567.
" " pages 625, 626.

The total tons of property reaching the Hudson river by state canals in 1857, was 1,617,187.

138 Between 1850 and 1856, inclusive, the average was about 2,000,000 tons.

Defendant's Dep., page 415.

The total tons going from tide water by the canals in 1857, was 340,176 tons. For six years prior to 1857, the average was about 500,000 tons.

Defendant's Dep., page 313.

139 During 1857, 381,390 tons of property passed through the canals into the Hudson river and to New York, without breaking bulk (page 416).

To transport this amount of property would require from 15 to 20 canal boats per day, during the season of navigation.

Much the largest number of canal boats passing to and
140 from New York, without breaking bulk, enter and leave the river at West Troy.

Much of the lumber reaching tide water by canal, is transhipped at Albany, West Troy and East Troy. Some

boats, laden with lumber from the canal, pass on to New York. 141

Defendants' Dep., page 470.
Complainant's Dep., pages 625, 626.

About *one-tenth* of the canal boats arriving at Troy and West Troy break bulk, and about *one-half* of those arriving at Albany. 142

Complainants' Dep., page 296, fol. 1312.
" " page 334, fol. 1502.
" " page 335, fol. 1503.
" " page 225.

The number of clearances of canal boats in 1857, at West Troy, was 8,017; at Albany, 7,012. In 1856, at West Troy, 11,967; at Albany, 7,713. In 1855, at West Troy, 9,501; at Albany, 8,677. In 1854, at West Troy, 9,958; at Albany, 11,136; and for ten years prior they were about equal at either place.

Defendant's Depositions, page 416.

The amount of property arriving at Albany by canal, and the number of boats cleared and property shipped from Albany, north and west, for the year 1858, up to June 14, is considerably greater than the number and amount for a corresponding period of the years 1856 and 1857. 143

Defendant's Dep., page 469.

Canal boats following the canal to Albany may pass out of the Albany basin into the river at the foot of Hamilton street, a considerable distance below the site of the bridge, and may enter the canal from the river the same way. 144

Defendant's Depositions, page 470.
Complainants' Depositions, page 397.
" " page 296.
" " page 225.

The number of lockages at the sloop lock in the dam across the Hudson above Troy, for 1856, were 1,036; for 1857, 4, 146. 145

Defendant's Depositions, page 417.

But for the side cuts at West Troy, authorized by the state Legislature, all canal boats seeking tide water, would
146 necessarily be obliged to reach it at Albany.

And it can not be doubted but that it is in the power of the state, so far to control its own internal improvements and regulate its own internal policy, as that for increasing the revenue of its canals, or promoting any other object deemed beneficial to its internal trade and travel—it may close the side cuts at West Troy and Port Schuyler and the lock at Waterford, and compel every canal boat seeking
147 tide water to pass over the canal to Albany.

Statement of the number and kinds of vessels passing different points in the river, at the site of the bridge, and above and below, at different seasons, with comments and explanations, etc.

The most active season of the year for business on the
148 river is in the months of October and November.

The number of vessels of all kinds passing Bath ferry for eight days between 23d and 30th November, 1857, inclusive, was 690, being a daily average of 92.

Defendant's Depositions, page 466.

Of this number 269 were canal boats, being a daily average of 34; 56 schooners and sloops, daily average, 7; 73
149 barges, daily average, 9; 25 first class steamers, daily average, 3; 267 second class steamers, daily average, 33, all of which with a joint in their smoke pipe, could pass under a bridge 20 feet above water (page 465).

To accommodate all these vessels would not require the opening of a draw probably more than once an hour, certainly not more than twice.

During the same time, at Douw's point, about two miles
150 below State street, Albany, the number of all kinds of vessels was 584, being a daily average of 78.

Defendant's Evidence, page 467.

Of this number, 92 were sloops and schooners, daily average, 11; 169 canal boats, daily average, 21; 123 barges, daily average, 15; 138 first class steamers, daily average, 17; 62 second class steamers, daily average, 8. 151

A draw opening twice an hour would probably accommodate all these vessels. Most of the large steamers never go above the site of the bridge, and so of some barges and sail vessels, and most of the vessels passing any given point are made into tows.

During 34 days between April 22d and May 31st, 1858, inclusive, 6,007 vessels of all classes passed the site of the bridge both up and down, at Exchange street, being an average of 176 daily. 152

Defendant's Depositions, pages 412, 413.

Of this number, 1960 were canal boats, and 563 barges, Total, 2523. Daily average of both, 76.

As these vessels necessarily were, and were in fact in tow of a steamer, the daily average of all passages requiring the opening of a draw, will be reduced 76, leaving it at 100, average. 153

This is the result if each steamer had in tow one barge or one canal boat requiring an opening for each barge or canal boat towed by a steamer.

It appears also that 329 vessels passed under sail; daily average, 9.

During same time 301 schooners passed (daily average, 8), and 316 sloops (daily average, 9). Total sailing vessels, 617. 154

Of this number of sailing vessels 329 sailed by; the balance, 288, were towed. Daily average, 8.

The number of passage steamers during same time was 60; daily average, 2. River tugs (vessels towing between Albany and New York), 384; daily average, 11. Troy tugs (vessels towing between Troy and Albany), 1126; daily average, 33. Harbor tugs (vessels towing about the Albany harbor), 1158; daily average, 34. Propellers 37; daily average, 1. 155

Upon this count, allowing one opening of the draw for each steamer and tug, propeller and vessel under sail, the
156 result of a day of 24 hours is as follows:

Draw opening for	passage steamers,	2
"	River tugs,	11
"	Troy tugs,	33
"	Harbor tugs,	34
"	Propeller,	1
"	Vessels, under sail,	9
	Total,	90

157

Or less than 4 per hour.

Of 19 tugs towing between Troy, Waterford and about Albany and New Baltimore, called "Troy tugs," 10 of them have the highest point of their wood work (the pilot house), less than 20 feet above water, and with joints in
158 their smoke pipes, could in ordinary water, pass under the bridge without opening the draw.

Defendant's Depositions, pages 456, 457, fols. 2239, 2241.

The wood work of two is 21 feet high, of two others 23 feet; two 25 feet; two 30 feet; and one 34 (the Baltic).

All the seven tugs towing in the harbor of Albany, called "harbor tugs," have wood work less than 20 feet
159 above water, and three of them have joints in their pipes. If the rest had joints all could pass under the bridge without a draw opening.

Defendant's Depositions, page 456, fol. 2240.

Of the harbor tugs three-sevenths, as at present rigged, will need no opening of the draw, and for this 15 openings should be deducted from the number given above, leaving
160 the daily average 75, or 3 per hour.

With joints in the smoke pipes of the other four harbor tugs and the 10 Troy tugs, whose wood work is under 20 feet high, there should be 51 openings deducted from the daily average of 90, leaving the necessary draw openings

39 in 24 hours, if the steamers and vessels passed singly. But under ordinary circumstances several may pass at one opening. 161

The pilot houses of two harbor steamers are so arranged as to be lowered if necessary.

Defendant's Depositions, page 455, fol. 2235–6.

The upper decks of the largest river barges are not to exceed 17½ above water, when light, and most of them are lower, with pilot houses capable of being lowered. At least eight-tenths of the river barges could pass under a bridge 20 feet above water. 162

Defendant's Depositions, pages 426, 427.

For six days, from June 4th to June 10th, inclusive, between 7 o'clock, A. M. to 6 P. M., the passages at State street, of river tugs, Troy tugs, harbor tugs, propellers and vessels, under sail, were 393; allowing a draw opening for each vessel, the number of openings daily, would be 65. 163

Defendant's Depositions, page 459.

Of the 393 passages, 234 were by harbor tugs. Deducting these leaves 159 passages in six days, or a daily average of 26 (vide page 459).

For three days at Bath ferry, June 11th, 12th and 14th, 1858, between 7 A. M. and 6 P. M., the number of Troy tugs passing, was 102, daily average 34; harbor tugs 33, daily average 11; 4 propellers and 13 vessels under sail. 164

Defendant's Depositions, page 459.

If the draw be opened for all, the daily openings are 50; and deducting harbor tugs, leave the draw openings between 30 and 40.

In reference to the reported number of passages of vessels, at the site of the bridge as above given, it is to be observed, that the number of passages is needlessly swolen, by the circumstance, that tugs towing vessels from Troy, to be made up into large tows for New York, in very many, and probably in most instances, passed down by Exchange street, 165

and then rounded to and passed up again, where the vessels in tow were made up with the large tows, and again passed the site of the bridge on its way to New York — thus giving
166 *three* passages for one vessel on the same trip, and making the commerce at Albany appear three times as large as it really is.

It also appears, that on many days when the most passages appear, many of the Troy tugs and harbor tugs, were engaged in sailing up and down the river past Exchange street, having nothing in tow, and apparently upon no business, except perhaps — knowing a watch was being kept —
167 to aid in swelling the number of passages.

Defendant's Depositions (A. S. Smith), page 447, fols. 2192-4; pages 452, 453, 454, fols. 2224-2225.
Evidence of W. S. Hawley, pages 436, 437, fol. 2144 to 2147.
Evidence of Rose, page 423, fols. 2076, 2077.

168 With a bridge erected, the large tows will probably be made up below, or they may be partly made up above, and pass the bridge and be then enlarged. In either event, towing vessels from Troy, will either round to above the bridge and leave their vessels, or passing under the bridge or through the draw, with the vessels in tow, attach them to the large New York tows below the bridge, for which operation there is plenty of room either above or below Exchange
169 street.

On the part of the complainants, a statement of the number of vessels passing Exchange street, between May 24th and June 3d, 1858, inclusive, for about 12 hours each day, upon the count of John B. Townsend of Troy, and his associates — is given in evidence.

Vide Complainants' Depositions, pages 588, 589, et. seq.

170 This statement is imperfect in many respects:

1st. It does not distinguish the kind of steam vessels passing, but classes all vessels propelled by steam under one head (page 589).

2d. It does not state how many vessels passed under sail, nor how many were towed.

3d. It does not state whether the tows passing, were made up for passing between Troy and Albany, or Albany and New York. 171

It moreover does not agree with the count, kept during the same time, by Rose and his associates.

It is to be noted, as a remarkable circumstance, that from the 18th day of May, down to the end of the count by Townsend, there was an unusual amount of passages by the Troy tugs and the harbor tugs, during the day time. Many of them passed each day, up and down, with no apparent business. 172

Defendant's Depositions, evidence of Smith, page 447.
" page 441, fols. 2162, 2163.

Most of the steam boats (and more than three-fourths of them), passing in Mr. Townsend's count, were engaged between Troy and Albany, and about Albany, known as Troy and harbor tugs. 173

Complainants' Depositions, pages 592, 593, fols. 2819, 2822-3.

More than seven-eighths of the vessels towed were canal boats (page 592, fols. 2817).

Some of these steam vessels passed Exchange street twenty times in six hours; some fifteen times; some ten times, and some less (page 595, fol. 2831 to 2834). 174

These were not legitimate passages, for no towing steamer is accustomed to make so many trips per day. They do not average more than three to five trips per day.

Some of them were, in the language of the witness, "*engaged in passing this point*," and apparently doing nothing else (page 594, fol. 2825). 175

Many of the steam boats, embraced in the statement, were towing from Troy, passed Exchange street down, rounded

to and passed up again, and were then made up into tows for New York—thus tripling the passages for one and the same vessel on the same trip (page 591, fol. 2812).

176 The tugs "Uncle Ben," "Redfield," and various others of the steam boats, were towing boats from one point to another opposite Albany (page 598, fol. 2845).

In the number of tows is included not only the three large tows made up at Albany, but all others, whether *towed from Troy to Albany or between poin's at Albany* (fol. 2846).

177 It takes from *two* to *four* steam boats to start a large tow for New York, and these are separately included in the list of steam boats passing Exchange street (page 596, fol. 2837).

As a further illustration of the needless activity of the small steamers in the harbor of Albany, during Mr. Townsend's term of service on the Albany Pier, take the 27th of May, for example, when between 7 A. M. and 7½ P. M., 178 132 passages of steamers are reported.

Complainants' Dep., page 589.

On the same day, A S. Smith reports forty-two Troy tugs, fifty-six harbor tugs, between 8 A. M. and 6 P. M.; total (towing canal boats, barges, &c.) during ten hours, ninety-eight.

During same time, thirty-five canal boats, four barges 179 and eight sail vessels being towed, passed by. *Total, forty-three.*

Defendant's Dep., page 441.

If each steamer towed one vessel, it leaves *fifty-five steamers passing without anything in tow*, or "*engaged in passing this point*," and nothing else.

On the 28th of May, Townsend reports 113 steamers 180 passing between 6 A. M. and 7½ P. M.

On same day A. S. Smith reports, between 8 A. M. and 6 P. M., thirty-eight Troy tugs and forty harbor tugs; total in ten hours, seventy eight.

During same time he reports thirty-three canal boats, two

barges, and seven sail vessels under tow; total, forty-two (page 341).

If each steamer towed one vessel, *thirty-six steamers passed on this day without anything in tow.* 181

On the 29th of May, Townsend reports ninety-six steamers between 7 A. M., and 7½ P. M.

On the same day, between 8 A. M. and 6 P. M., A. S. Smith reports twenty-three Troy tugs and twenty-nine harbor tugs; total, fifty-two.

During same time he reports sixteen canal boats, four barges, three sailing vessels under tow; total, twenty-three. 182

If each steamer towed one vessel, *twenty-nine steamers passed on this day without anything in tow* (page 441).

The above illustrations could be greatly multiplied, to show that the actual and necessary openings of a draw at Albany, to accommodate its business, will be greatly less than *apparently* would be necessary, from the statements of the passing of different vessels, without explanation. 183

Mr. Townsend's statement is objectionable and unreliable because it is so general as to convey no real information in respect to the number of draw openings required.

It is the separate work of three persons, aggregated. The number of passages seen by each separately, at different times of day, is not given, 184

There is some ground for believing that, during the watch kept by Townsend, there was considerably more than ordinary activity among the small steam boats doing business with Troy, and about the harbor.

It is certain that before and immediately after, the passages were considerably less in number.

For six days immediately after Mr. Townsend closed his watch, the daily passages of Troy and harbor tugs were reduced about one-half, in the aggregate. 185

Defendant's Dep., page 459.

Moreover, it is apparent that the rounding to of the Troy

tows below Exchange street (the large tows being now made up above) unnecessarily, increases the apparent number of passages and vessels.

186 A bridge being built, the very large tows will probably be made up below, and a Troy tow will pass the bridge *but once*, instead of *three times.*

With the erection of a bridge, the two ferry boats of the Western and Hudson River rail roads, each of which now crosses the river with passengers and freight just above Exchange street, once at least every fifteen minutes (making eight passages across per hour, and more than the ordi-
187 nary passages of steamers up and down), will disappear; and by this, much more room will be afforded for vessels in the basin or at the pier above the bridge, or coming from Troy and rounding to for the purpose of reaching a dock, or approaching a large tow made up for New York.

The large tows, as they are accustomed to be made up at Albany, are a nuisance to all other navigators, and the in-
188 terests of navigation will be promoted, by compelling a reduction of their proportions or having them made up further down the river.

The very large tows coming from New York are now accustomed to break up below Albany, and often below Greenbush, where the boats comprising the tow destined for Troy are taken by the small steamers, and pass up the
189 river.

Defendant's Depositions, page 437, fol. 2146.
" " " 454, fol. 2229.

And there is but little difficulty in detaching vessels and diminishing a tow, to enable it to pass vessels aground or over shoal places, &c., &c.

Deft's Depositions, pages 169, 177, 185, 204, 212, 217.

190 It is estimated by intelligent navigators well acquainted with the river at Albany, that *three-fourths* of all the vessels navigating the river at Albany could pass under the proposed bridge, with the draw closed, and in this number is

2869

embraced canal boats, Philadelphia coal boats, and barges without masts.

Defendant's Depositions (P. P. Staats), page 171, fol. 841.
" " " " 173, fol. 855.
" " (H. Bedell), " 178-188.
" " (W. J. Ensign), " 201-202.
" " (W. H. Maston), " 205.
" " (Wm.J.McAlpine), p. 81,100-101.

191

The accuracy of this estimate will be seen by comparing the number of canal boats, barges, &c., with other vessels passing above the bridge. There are at least *four* canal boats to *one* barge, as shown by the statements, and canal boats are increasing while barges are decreasing, and sailing vessels are comparatively obsolete.

192

Not one-half of the barges on the river have what are called *masts*, and these *masts* are not ordinarily used in propelling the vessel.

Barges without masts can readily pass under a bridge, elevated twenty feet above water, for their upper works when the vessels are light, do not reach twenty feet high, and when laden, they are from four to six feet lower.

193

Vide Complainant's Depositions (Ev. of H. Swartwout), page 187, fol. 812; page 188, fol. 813; page 190, fol. 824.
Defen lant's Depositions, page 419, 426, 462.

There is no difficulty, and it need be attended with but little inconvenience and expense, to so modify every barge on the river, that it may pass under the bridge with the same facility as a canal boat.

194

FOURTH.—Facts in respect to the magnitude and extent of travel and traffic across the Hudson at Albany; the inconvenience, delays and dangers of a ferry; and the extensive public interests to be accommodated by a Bridge at Albany, etc., etc.

195

On the east shore of the river at Albany is the terminus of the Western Rail Road, and the Hudson River, connecting with New York and Boston; the Troy and Greenbush

(leased by the Hudson River R. R.), connecting with Troy and the north, also has its terminus at East Albany.

On the west shore, the New York Central Rail Road terminates; also, the Albany, Vermont and Canada Rail Road, which connects Albany with Rutland, Saratoga and the north. The Albany and Susquehanna Rail Road (connecting Albany with Binghamton), is in progress, and will be completed.

A very large amount of rail road travel and traffic, from the east and west, and from the south, seeks a passage over the river at Albany.

The facilities for this passage are now two steam ferry boats, owned respectively by the Western and the Hudson River rail roads.

It is shown by investigations made in the fall and winter of 1855–6, that the average number of persons daily passing over the rail road ferry at Albany, was 3,771.

(The passenger business up and down the river by the Troy passenger steamers, is a daily average of 135.)

Daily average of freights, 1,436½ tons. Equal to 140 car loads.

At this time (1855–6) the number of passengers crossing in a year was 1,175,612; freight per year, 448,176 tons; baggage, 7,920 tons; express freight, 11,768 tons; mails, 2,124 tons.

Vide Defendant's Depositions, pages 337, 338.

By the State Engineer's report for 1855, it appears that the number of passengers carried by four of the principal roads converging at Albany, viz: Albany and West Stockbridge (the Western), New York Central, Hudson River, and Troy and Greenbush, for the year 1855, was 4,655,955; freight, in tons, 1,116,514.

Of this amount, the New York Central carried, passengers, 2,717,477; freight, 670,073 tons. The Hudson River, passengers, 1,540,856; freight, 139,968.

See Defendant's Depositions, page 339.

Not included in the above is the business of the Albany,

Vermont and Canada Rail Road, which in 1855 carried 242,151 passengers, and 45,289 tons freight.

Not included in the freight crossing the river is an express company, called Merchants' Despatch, which in 1857 carried 12,194 tons. 201

Defendant's Depositions, page 339.

The amount of mails passing are now greater than in 1855.

Defendant's Depositions, page 340.

The expense of getting freight across the river at Albany from one rail road to another is 37½ cents per ton. 202

Defendant's Depositions, page 340, fol. 1668.

And in addition to transporting freight by ferry boats or carts across the river, three lighters are employed between the New York Central and Western Rail Road.

Defendant's Depositions, page 340, fol. 1669.

The number of tons of freight carried by the New York Central Rail Road, is increasing every year. For 99,605,836 tons carried one mile in 1855, 145,733,678 tons represents the business of 1857. 203

Defendant's Depositions, page 417.

The number of tons freight actually transported show a rapid annual increase of rail road business.

See Complainants' Depositions, page 581, fol. 2735.

See also, in respect to passenger business of 1856, New York Central. 204

See Complainants' Depositions, pages 582, 583.

This shows a very light decrease of total passenger business for this year as compared with 1855, although freight increased.

In 1857 the decrease in tolls from 1856 on the canal was $702,571, and the increase of freight receipts of New York Central was $231,508. 205

Defendant's Depositions, page 412.

The canal business of 1857 was nearly one half less than in 1856.

206 See statements, Complainants' Depositions, pages 584, 585, 586.
Defendant's Depositions, pages 413 to 416.

During about five months every year there is no navigation of the canals or river.

The passage of the river by ferry boats at all seasons under the most favorable circumstances is attended with delay, and inconvenience to passengers.

207 Rail road freight is required to be transhipped and carted across the river, or taken by lighters, at an expense per ton of 37½ cents.

At the breaking up of the river in the spring, and at its closing in the fall of each year, passengers and freight are subjected to great and ruinous delays. Passengers are detained from one to two days, and freight sometimes from
208 10 to 15 days, and usually from one to five days at a time.

Defendant's Depositions, page 341, fol 1675.
" " pages 332, 333, 334.

The ferry boats loaded with passengers and freight are frequently detained by the large tows which are made up at Albany for New York, in the vicinity of the ferry ways.

209 Defendant's Depositions, page 353.
" " page 341, fol. 1672.

The passage of the ferry boats in times of freshets, is attended with various delays, and more or less danger to passengers.

The boats, for the accommodation of passengers, are obliged to pass the river at all times of day, as well as late
210 at night, on the arrival of trains from Boston and New York, with passengers for the west.

The large and valuable mails and express freight for the west and north usually pass with passenger trains, and are subjected to the same delays and peril.

For the season of 1858, *seven* regular passenger trains

2813

and seven regular freight and emigrant trains leave Albany for the west. From Troy *three* passenger and *two* freight trains leave daily for the west.

Five regular passenger trains from Buffalo, and *one* local train from Schenectady arrive at Albany daily, and *six* freight (including one live stock) trains. 211

On the Western Rail Road (Albany and Boston), *three* regular passenger and *two* freight trains arrive at and depart from East Albany, daily.

On the Hudson River road, three regular passenger trains arrive and depart daily; also two freight trains, to which a passenger car is attached. 212

The Troy and Greenbush road being under a perpetual lease to the Hudson River road, runs in connection therewith, besides running several local trains between Troy and Albany.

The Albany, Vermont and Canada road runs several through and several local trains, daily. 213

It is apparent from the history of rail road traffic and enterprise that Albany is the point, on the Hudson river, a which, passengers and freight between the east and west, seek passage across. All the extensive roads either way, centre at Albany. The freight and passenger business of each is constantly increasing, and the business interests requiring facilities for passing the river, at Albany, are daily becoming more important both in respect to passengers and freight, and this is so despite the efforts of cities like Troy to divert travel and traffic from its natural channels, and make themselves places of public importance. 214

There is some evidence given by the complainants respecting the facilities by rail road, over the Schenectady and Troy Rail Road — across the bridge at Troy — and through the city over the Troy Union, and the Troy and Greenbush, to connect at East Albany, with the Western and the Hudson River Rail Road. 215

In respect to this, it may be said that the Schenectady and Troy road has but a single track, is very crooked and

of heavy grades. It is not the natural way of travel and traffic, and while this road was owned by Troy, all its efforts were insufficient to give the road business enough to
216 pay its running expenses, and Troy was annually taxed to pay deficiencies.

Complainants' Depositions, pages 612, 613.

The road is now operated it is believed, to its full capacity, in the transportation of freight (few passengers go that way), and it is incapable of doing one tenth of the business of the New York Central road.

217 The bridge at Troy is the private property of the Rensselaer and Saratoga Rail Road Company, and has but a single rail road track.

The Troy and Greenbush is but a single track rail road.

The distance from Schenectady to East Albany by rail road, via Troy, is five or six miles greater than via
218 Albany.

Complainants' Depositions, page 686.

In regarding the respective interests which have business across, and which passes up and down the river, with a view to a reasonable accommodation to both, the following suggestions are submitted:

1st. The passenger business on the river between Troy and New York is comparatively insignificant, and has
219 largely decreased since 1845.

2d. The rail road passenger business passing across at Albany is not only very large and extensive, but has been and is constantly and rapidly increasing.

3d. The freight business across the river is extensive and on the increase, and the facilities for passing freight and passengers are inadequate, inconvenient, expensive and
220 dangerous. Nothing but a bridge can supply the public necessity.

4th. In respect to freighting business on the river, it is to be observed, that in conducting it, sail vessels are practically ignored, and barges are gradually giving way to

canal boats. The business of the river depends largely upon the canals, and with the completion of the canal enlargement, the introduction of steam thereon, all through freight will pass on to New York without breaking bulk, and the river barges will become obsolete. The capacity of the enlarged canal boat is about equal to the ordinary barges. These boats will need no opening of the draw of a bridge at Albany. Hence the great and growing land traffic may be accommodated with a bridge, with greatly less inconvenience to the business of the river, than if that business was now conducted in the kind of vessels employed in former years. 221 222

5th. It is, moreover, certain, that in the movement of freight upon the river, delays of moderate duration are of vastly less importance than detentions to large numbers of passengers. The business of the whole country is so connected with and dependent upon the speed, certainty and regularity of rail road trains, that a "failure to connect," or the detention of a train is attended with serious consequences; whereas in the business of water navigation, it is a common circumstance for vessels, laden and unladen, to lie idle at their wharves for hours, days and weeks, and to be detained aground on sand bars, and by various other causes, without affecting seriously the business of navigation. In this business, regularity and certainty to an hour or a day is not important or expected, and the success of the business in no way depends upon it. It is impossible that a little delay at a draw bridge can seriously affect a commercial business worth preserving. 223 224

6th. The fact that rail roads are capable of being used for all seasons of the year, gives them vast importance over river navigation, which can be conducted only for two-thirds of a year. Speed is another important element, and the probable increase of rail road travel and traffic, for all time, is to be regarded in determining its importance, when compared with navigation at and above Albany. 225

Rail road trains are run upon time tables known to all men of business, and upon their certainty and regularity, the most extensive financial and commercial interests depend. They are not only of vast and increasing importance in every aspect, but the certainty by which they are expected to reach distant points, is a chief element in their public utility.

On the other hand, the importance of river navigation does not in any great degree depend upon its moving with precision, nor does the arrival of vessels laden with feight at any particular hour, form any element in the success of the business conducted in sloops, schooners, barges and canal boats.

FIFTH—Facts in relation to draw bridges over navigable waters; their practical effect upon commerce and navigation; the facility with which they are operated, &c., &c.

There are a very large number of draw bridges over navigable waters, in the United States, at points of more or less commercial importance.

Evidence of W. J. McAlpine, Defendant's Depositions, page 84.

As to their effect upon the business of the river, opinions vary with the prejudices of persons expressing them. As a general thing, navigators are hostile to draw bridges of all kinds, at all places and under all circumstances. To this however there are exceptions.

The location of the proposed bridge at Albany, all circumstances considered, is more favorable to its successful operation, than any other draw bridge of any importance, of which any account is given.

THE CHICAGO BRIDGES.

Of the effect and operation of draw bridges, through which an extensive commerce passes, those at Chicago afford an example of some importance. 231

There are fifteen draw bridges over the Chicago river, within a distance of about 4 miles, and in the corporate limits of the city, through some of which most of the extensive commerce of that port passes.

Defendant's Depositions, pages 2, 3, 4, 6, fol. 30.
" page 13, fol. 63. 232

These bridges are of various forms of construction, with various width of draw. Clark street bridge gave originally a clear channel for the passage of vessels of 75 feet (fol. 10).

Randolph street bridge, a draw of 80 feet.
Van Buren street, " 75 "
Kenzie street, " 50 "

Clark street bridge, rebuilt in 1852, with a turn-table draw, giving two channels for passing vessels, each of 78 feet in the clear. The draw rests upon a pier in the centre of the river, 30 feet wide and 200 long. Two men open it in a minute (fol. 12). 233

Lake street bridge is of a like character, with a similar draw, giving two openings of 76 feet each.

Chicago avenue bridge was a double hoisting draw, giving a channel of 44 feet. It is now a float bridge. 234

The Wells street bridge has a turn-table draw, resting on a centre pier 35 feet wide and 220 feet long, giving two channels of 77 feet.

Rush street bridge is made of iron, with a turn-table draw, giving two channels of 80 feet each. The draw is operated by two men, who open and shut it in one minute.

Defendant's Depositions, page 4, fol. 17. 235

Rush and Wells street bridges are about 18 feet above low water mark, and canal boats and river tugs pass under

them without the draw being opened (fols. 18, 19). The draws are opened for steamers and sail vessels.

236 The principal part of the commerce of Chicago passes through Rush, Clark and Wells street bridges.

From 50 to 100 vessels pass these bridges daily, and not one in 50 are at all impeded in their progress.

Defendant's Depositions, page 120, fol. 596; page 131.
Defendant's Depositions, page 4, fol. 20; page 5, fol. 23; page 119, fol. 592; page 66, fol. 320; page 74, fol. 366.

237 It takes from 2 to 5 minutes for the vessel to pass, and sometimes 4 vessels pass—two each way—at the same opening of the draw.

Defendant's Depositions, page 8, fols. 37, 38.
" page 36, fol. 176.
" page 47, fols. 235, 237.
" page 111.

238 A thousand vessels pass these bridges safely, to one that receives injury (page 34, fol. 167; pages 119, 595; pages 124, 125, fol. 625; page 126.

The tugs towing on the Chicago river have joints in their smoke pipes (page 35, fol. 175).

500 or 600 sailing vessels, 30 or 40 propellers, and 6 to 8 steam boats, trade at Chicago during a season, and all of them pass some of the bridges.

Defendant's Depositions, page 59, fol. 294.
239 " page 109, fol. 545.

An accurate count of the draw openings, at the Clark street bridge, Chicago, for 30 days, ending Aug. 3d, 1856, shows 2,947 openings, daily average 98; and this is a fair average of the passages per season.

Defendant's Depositions, page 131.
" page 125, fol. 624.

240 The largest number of openings, for any one day, was 150. For 14 days out of the 30, the openings each day exceeded 100.

There is little current in the Chicago river, except in the spring freshets.

The river is narrow, averaging about 200 feet wide, and is quite crowded with vessels during the season of navigation. 241

Most of the detentions to vessels have occurred at the float bridges with narrow openings. With the pivot draw, giving two channels for the passage of vessels, no material difficulty or delay is experienced.

Notwithstanding the number of bridges across the river at Chicago, the value of property and the commercial business *above* the bridges, or some of them, has very largely increased and is still increasing. 242

Complainants' Depositions, pages 49, 50.

As to the practical effect and operation of the Chicago bridges, the following witnesses give evidence on the part of the defendant:

Dorastus Harper of Chicago, bridge builder and Superintendent of public works, pages 1 to 32. 243

Charles Spaulding of Chicago, engaged in building and repairing bridges, pages 32 to 45.

Andros B. Stone of Chicago, bridge builder, for 18 years, pages 45 to 58.

Bowen S. Shephard of Chicago, engaged in the shipping and vessel business, pages 58 to 61.

Thomas Dyer of Chicago, shipping merchant and Mayor of the city, pages 61 to 64. 244

James Chaloner of Chicago, a master mariner, pages 64 to 72.

Edward H. Wheaton of Chicago, master mariner, pages 72 to 77.

Wm. A. Ingles of Chicago, master mariner, pages 108 to 114. 245

Thomas Lewis of Chicago, formerly sailor, now bridge tender, pages 119 to 123.

Elihu Granger of Chicago, alderman, chairman of com-

mittee on bridges, Superintendent of public works, &c pages 123 to 131.

Each of the witnesses above named, state from actual observation and experience, that the bridges at Chicago
246 present no substantial impediment or obstruction to vessels navigating the river. That vessels are seldom detained or injured by reason of the bridges.

On the part of the complainant the following witnesses were examined touching the Chicago bridges:

Wm. A. McPherson, Chicago, mariner, captain of a tug steamer.

247 Complainants' Depositions, pages 12 to 24.

Wm. N. Burton, Kenosha, Wisconsin, captain of a tug steamer, pages 25 to 55.

John W. Hibbard, Chicago, mariner, captain of a tug steamer, pages 55 to 70.

Alfred Mosher of West Troy, navigator, pages 76, 77, 79, 82, 83.

248 These witnesses say that the bridges are an obstruction to navigation. That vessels are sometimes detained and injured.

By reference to the cross-examination of these witnesses it will appear—

1st. That they testify with all the prejudice of navigators against draw bridges, and are men of very limited intelli-
249 gence.

2d. The most of the detentions and accidents spoken of happened at the float bridges, which are admitted to have been of imperfect and improper construction.

3d. It is also apparent that for most of the detentions and accidents mentioned, the bridges were not responsible. It was generally the result of an unusual press of vessels in
250 the river, and the carelessness of the navigators. In some instances by neglect of the bridge tenders, the draws were not opened in season.

4th. And these witnesses substantially admit that with

draws such as are required at Albany, no impediment would exist.

Vide particularly, Complainants' Depositions, page 12, fol. 44; page 15, fol. 53; page 16, fols. 57, 60; page 17, fol. 63; page 18, fol. 69; page 22, fol. 86; page 24, fol 93; pages 27, 33, fol. 130; page 37, fols. 145 to 147; pages 38, 40, 45, 48; page 52, fol. 216; page 53, fol. 218; page 56, fols. 230, 231; page 66. 251

THE ROCK ISLAND BRIDGE.

The Rock Island Bridge is for rail road purposes, and crosses the Mississippi river. Its length is 1582 feet, with a draw of 283 feet long, resting on a centre pier, giving two openings for the passage of vessels, of about 120 feet each. 252

Defendant's Dep., page 46, fol. 229.

The bridge is elevated about 28 feet above ordinary water, 31 to 33 above low water, and about 18 feet above high water. 253

In the ordinary stage of water the current at Rock Island is from 4 to 6 miles per hour (*greater than the current at Albany in the highest freshet*).

Defendant's Dep., page 48, f l. 239.
" " " 82, fol. 409.
" " " 104, fol. 520. 254

It takes two men from one minute and a half to three minutes to open the draw, and it can be opened in half a minute (page 82, fol. 408; page 105, fol. 522, 523).

The current of the river at Rock Island is not only rapid but does not run true with draw openings.

Most of the accidents which have occurred there have been occasioned by cross currents, bad management by navigators, and by reason of a false chart of the river, called the "St. Louis Chart," by which navigators were misled (page 107, 108). 255

The principal passages on the river at Rock Island are by steamers, having barges in tow.

Defendant's Dep., page 104, fol. 517.

256 As many as six coal boats and barges are taken down the river in tow of a steamer, without difficulty or danger, if the pilot understands the business of navigation.

Vide Evidence of H. Decker, pilot on the Mississippi.
Defendant's Dep., pages 132 to 135.

In reference to the influence and effect of the Rock Island Bridge upon the navigation of the river on the part of the
257 defendant, the following witnesses testify:

Andros B. Stone, bridge builder, page 48.
Wm. J. McAlpine, civil engineer, page 82.
Seth Gurney, Rock Island bridge tender, page 104.
Charles L. McAlpine, civil engineer, page 115.
Henry Decker, Mississippi pilot, pages 132 to 135.
B. B. Brayton, civil engineer, pages 135, 136.
258 John E. Henry, civil engineer, page 142 and
R. B. Mann, contractor, page 147.

All of whom have witnessed the practical operation of the bridge, and concur in saying that it presents no material obstruction to the navigation of the river.

On the part of the *complainant*, a single witness, Henry
259 A. Forse of Rock Island (captain of a steam boat running past the bridge), says the bridge is an injury to navigation.

Complainants' Dep., pages 1 to 12.

This witness was never detained or damaged by the bridge, nor has he ever seen a case of damage or detention, solely attributable to the bridge. The detentions and injuries at this point are occasion by the winds, and the cur-
260 rents and rocks in the river, and sometimes by reason of the extreme darkness of the nights, rendering navigation dangerous (vide fols. 6, 7, 19, 21, 24, 35, 37, 40).

OTHER DRAW BRIDGES.

Various other draw bridges, their operation and effect, are spoken of by different witnesses.

261 There is a draw in the rail road bridge over the Galena river at Galena, with two openings of 120 feet each.

Also one over the Maumee, at Toledo.

One at Cleveland, over the Cayahuagua.

For various others, see Defendant's Dep. (Wm. J. McAlpine), page 84; also A. B. Stone, page 45; C. L. McAlpine, page 115; B. B. Brayton, page 135; John E. Henry, page 141; R. B. Mann, page 145; Ellwood Morris, page 366-7; E. F. Johnson, page 390. 262

The draw bridge over the Schuylkill river, at Gray's Ferry, has passed 180 sailing vessels per day, the draw remaining open for each vessel, an average of $4\frac{1}{2}$ minutes.

Defendant's Dep., page 390, fol. 1916.

263 The actual experience at various places where important draw bridges have been erected, shows that in a favorable location, with a properly constructed draw, operated with skill, there need be no material obstruction to the navigation of the river, if navigators give proper attention to the handling of their vessels.

264 As to the effect of the proposed bridge at Albany upon navigation, opinions (as is customary in such cases) vary, and much the largest space in the printed evidence on the part of the complaint, is occupied by the *opinion* of navigators and others, as to the effect of the bridge at Albany. Many who give opinions never navigated or saw a vessel navigated through a draw bridge, and scarcely any ever passed a draw bridge of wide opening, proper construction and good management, and *none* ever passed a draw of the width proposed at Albany.

265 It is to be observed also, that nearly all the witnesses for the complainants are citizens of Troy (and real parties complainant) and vicinity, violently opposed to a bridge at Albany, and who have been a long time engaged in an

exciting and angry controversy about it; and give evidence under the influence of great prejudice against a bridge at Albany, and very exalted ideas of the city of Troy and its importance among the powers of the earth.

266 A leading feature in this evidence is this: that most of the adverse opinions as to the delays and dangers of a bridge at Albany, are based upon the idea that great freshets and high winds are the common conditions of the river, rather than the exception, and that the draw of the bridge is to be closed generally when vessels desire to pass. It has been the favorite theory of the complainants' witnesses to imagine difficulties and dangers that never (or scarcely ever) exist, and found thereon opinions hostile to the feasibility of a bridge at Albany.

267

The most prominent ground of opposition is, that the commerce is so extensive as to render a draw incapable of passing it.

Some examples of this testimony it will be useful to refer to as illustrating the whole.

268

Alfred Mosher, of West Troy, navigator, gives his opinion, that *night and day* during the season of navigation, vessels would require to pass the draw at Albany every *five minutes*—equal to 288 per day (page 85, fol. 355).

In a *high* freshet, with a *heavy* wind and the *draw* of the bridge *closed*, a steamer with a tow would be in danger of getting foul of the bridge (page 88, fol. 368).

269

There is no difficulty, *with proper care and skill* (page 88, fol. 163), in passing between Troy and Albany with tows as wide as the crooked channels, but difficult in front of Albany with a straight current, to attempt to navigate the tow through spaces as wide and wider than the channels.

There is *not* room *above* the bridge to round to a large steamer (page 89, fol. 371). There is room *below.*

270

(*Large tows* have room to make up *above* the bridge, but it is said *not* room enough *below.*)

Sail vessels will find it difficult to pass the bridge with a

2825

head wind, when they are *just able* to make their course (page 90, fol. 375).

THOMAS A. TILLINGHAST, of Troy, forwarder, says that making up tows at Albany occupies about *all* the river from Exchange to 1000 feet *above* Columbia street. That is, the whole width, about 900 feet, and one-quarter of a mile up and down. 271

The river is as wide for one and one-half miles below as at Exchange street, and yet there is *not* room enough to make up tows *below*, but *more* room *below* to round the vessels than *above* (page 103, fol. 432).

This witness says that the *large tows* can pass between Troy and Albany whenever they can go from Albany (page 105, fol. 440). 272

He first swears (fol. 442), that vessels would require the draw to be opened every ten minutes, and finally alters it and says once in *five minutes* (page 108, fol. 454).

SILAS BETTS, of West Troy, forwarder, never passed through a draw (page 108, fol. 456); thinks a bridge a great obstruction, and that it would not be safe to navigate a *large steamer* through the bridge, *with a freshet in the night* (page 110, fol. 464); not room enough for a large steamer to round to *above the bridge*, unless one end was fastened (page 111, fol. 464); *not* good anchorage in a *freshet*, for heavy laden vessels (fol. 468). 273

There would be *more or less* danger in dropping a tow through the piers if *the wind was blowing* (fol. 470). 274

A bridge with *two* draws of 200 *feet each* would be a *material* obstruction (page 112, fol. 474).

No difficulty in running a steamer with the current through a well defined space of 110 feet wide in the daytime *if there was no wind* (page 114, fol. 482).

HENRY HAYFORD, steamboat pilot, West Troy, expresses an opinion against the bridge. Has never passed a draw bridge except at Troy *twice* (page 132, fol. 556). 275

NATHAN H. NOYES, of Lansingburg, boatman, has passed draw bridges at Waterford, Troy, on the Schuylkill, and at

Wilmington, and draw bridges are in *most cases* a detri ment to navigation. *according to his experience* (page 138, fol. 580).

276 The detention at the Troy bridge is now *generally slight* (page 142, fol. 602). The bridge is *unfavorably* located. (fol. 605).

Has passed this bridge 400 or 500 times, sometimes detained by *not having the draw opened in time*, and at others by *something aground in the draw. If the draw had been open and clear no detention would have occurred* (page 143, fol. 607).

277 The draw at Wilmington is 30 feet wide. If 20 feet wider with a tug to tow *would have had no difficulty* (page 144, fol. 608).

The draw on the Schuylkill is 50 or 60 feet wide; passed 12 *times* with a fore and aft schooner; had difficulty in but two instances, *and with a tug would have gone through without difficulty* (fols. 610, 611).

278 The opinion of this witness adverse to the bridge at Albany, is based upon *his experience* (page 152, fol. 648).

Would have *no difficulty* in passing such a bridge as is proposed to be built at Albany, under ordinary circumstances (page 152, fol. 649).

HENRY SWARTWOUT of Lansingburgh, boatman, has passed bridge at Troy and Waterford (page 159, fol. 681). Would not think it safe or proper to go through the pro-
279 posed bridge at Albany *with a large tow in a freshet or with a high wind* (page 162, fol. 695).

At such a bridge as is proposed at Albany, under ordinary circumstances there would be no detention (page 169, fol. 720).

JOHN N. MITER of Lansingburg, boatman, owner of steam boat John S. Ide, towing between Waterford, Troy
280 and Albany, says the *effect* of a bridge would be *bad*, from danger of *collision* with the bridge and vessels. It would create an *extensive revolution in business.* There would

have to be *some other place* for vessels to *anchor and lay in* (page 194, fols. 839, 840, 841).

He would go through the bridge with a tow of barges *in a freshet* if there was nothing in the way *below* (fol. 842). Has towed through the Troy bridge with the steamer 30 times a day (page 195, fol. 844). 281

The bridge at Troy is unfavorably located. The draw can be opened in a minute (page 204, fols. 886, 887).

His idea of draw bridges is predicated upon his experience at the Troy bridge (page 207, fol. 901).

ROBERT ROBINSON of West Troy, forwarder, thinks a bridge at Albany would be a great detention to navigators and a *detriment to all forwarders and real estate owners above it* (page 217, fol. 949). 282

Not easy to pass *with the draw closed in a freshet*, or to round to (fols. 953, 957). Anchorage at Albany not reliable *in a freshet* (page 220, fol. 961).

Has opposed the Troy bridge, the contemplated bridge at Newark and Albany, and has strong prejudices against draw bridges (page 221, fol. 967). 283

If the draw at Newark was as wide as at Albany there would be no difficulty in getting vessels through (page 223, fol. 976).

This witness is of opinion that the ferry boats at Albany, carrying daily about 4,000 passengers, and large amounts of freight *across* the river *have nothing to do with the commerce of Albany, and that the commodities they carry across the river are not as legitimate commerce as those carried up and down the river on other vessels* (page 230, fols. 1009, 1010). 284

Any bars likely to be formed by piers could be dredged so as not to injure navigation (fol. 1025).

LEWIS D. DEMING, West Troy, pilot of the Francis Skiddy, thinks the bridge would be a great obstruction. *Not safe to take the Skiddy down through the bridge in a freshet with a heavy wind across her* (page 246, fol. 1083). Not 285

safe to attempt to pass unless he had the *vessel under control.* He can *round the Skiddy to above Exchange street when there is no wind or current,* but not with both wind
286 and current (page 247, fols. 1086, 1087).

LEVI SMITH of Troy, captain of the Skiddy, thinks *with two draws of* 110 *feet it would be very dangerous to get a large boat through with heavy winds and a high freshet* (page 258, fol. 1138).

A draw of 180 *feet would be of no use,* if vessels had the right to pass through it each way at the same time
287 (fol. 1140).

Would not feel safe in passing the Skiddy, with the wind across, through a draw of 180 *feet if another vessel was in the draw at the same time* (fol. 1141).

Under ordinary circumstances the Skiddy could run safely through spaces not more than 35 or 40 feet wider than herself (page 268, fol. 1182).

288 It requires skill and the utmost care to navigate large vessels between Troy and Albany (page 269, fol. 1186).

JOHN OLIVER of Troy, pilot and owner of the steamer McAllister, has frequently passed the Troy bridge, and can not pass with as much ease as if there was no bridge, *on account of the different stages of the water* (page 277, fol. 1223).

This witness says that a bridge at Albany would be a
289 great obstruction to navigation, "*to build a fence across a highway would of course be an obstruction*" (fol. 1244).

He can't see how collisions could be avoided *if the draw was open all the time* (fol. 1248).

With a draw located in the centre of the river he would not consider himself as safe as in other parts of the river (page 288, fol. 1277).

290 He had rather pass between two vessels aground than two piers of a bridge (fol. 1279).

Can't say whether a barge would lurch 40 feet or not in passing the Troy Bridge in a given case (fol. 1281). (Vide

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evidence, pages 291, 292, as to the evasions of witness in respect to given cases of detention at Troy Bridge).

DAVID MANN, Troy, agent of the Troy and Philadelphia barges, says that a bridge at Albany would be "*highly injurious*" to navigation, and that *if one of his propellers with two barges in tow were going down in a freshet, and the draw was closed they would run against the bridge* (page 301, fol. 1336). 291

It would also be "highly injurious" to commercial business above it (fol. 1337).

Yet *the propellers and barges of this line pass through the Delaware and Raritan canal and the numerous bridges over it* (page 303, fol. 1348). 292

He has *navigated* the river as *steward* and *clerk* of the *steamer John Mason* (page 304, fol. 1351).

ISAAC R. GETTY of West Troy, navigator, has passed four times through bridges at Newark and fourteen or fifteen times for three seasons at Troy, and they are a "very great detention" (page 317, fol. 1415). 293

A bridge at Albany "would be a very great obstruction." It would not be safe to take a steamer through in *a freshet and heavy wind blowing across in the night* (page 321, fol. 1435).

All navigators are opposed to bridges (page 322, fol. 1442). 294

His opinion is based upon his experience in passing a draw (fol. 1456).

Saw but one accident to a vessel passing the draw at Troy, and that was the fault of machinery. The draw could not be opened. If it had been opened, no injury would have occurred (fols. 1474, 1475).

At Newark, in a draw of 24 feet wide, had some damage which would not have happened if the draw had been 60 feet wide (fol. 1477). The draw at Troy is the largest he ever saw (fol. 1478). 295

(See pages 330, 331 and 335, as to vessels aground between Troy and Albany, and delays from that cause).

H. W. HAZARD of Troy, forwarder (partner of complainant Silliman), has passed the Troy Bridge a few times, and gives an opinion against bridge at Albany (vide his cross-examination).

296 DAVID H. HITCHCOCK of Albany, captain of the steamer Anna, towing between Troy and Albany, is often *detained three-quarters of an hour by the press and confusion of vessels in Albany harbor* (page 375, fols. 1704, 1705.

Independent of local towing, vessels pass Exchange street *once in thirty minutes* (page 376, fol. 1708).

A bridge would materially injure navigation (fol. 1717),

297 and "*would be dangerous whether there were any vessels there or not*" (fol. 1728).

He would not undertake to go through the draw with a large tow at all, and with a small one *would not have a vessel within* 700 *or* 800 *feet of the bridge either above or below* (page 378, fol. 1719).

No piers can be put in the river at Albany that will not

298 form a sand bar (fol. 1732).

If a vessel should go against a pier *she would surely sink; no spring pile could save her* (fol. 1734).

"Any piers *would be sure* to cause the ice to dam against it" (fol. 1740).

Large steamers could go through the draw in the day time *with a freshet*, but not at night (fol. 1746).

299 If a large Troy steamer was approaching the bridge *in a freshet*, and when *near* it *should be obliged to stop or slow*, and the *wind or current should catch her stern so as to carry it out of shape, she would go foul on the bridge and nothing in the power of man could prevent it* (page 384, fol. 1747).

(Vide cross-examination, as to crowd of vessels at Albany-pages 386, 387).

300 The ferry boats at Albany are often detained (page 389, fol. 1773).

30 *canal*, 6 *steamers*, 8 *barges*, 4 *plugs*, 4 *sail vessels* (*and even a less number*), *fill the river at Albany* (fol. 1775).

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So as to detain vessels, while being made up into tows for New York (fol. 1777).

Tows at times are a serious obstruction to navigation (page 390, fol. 1780). 301

(Vide page 391, for reason why tows can not be made up below Exchange street.)

Never passed a draw bridge (page 403, fol. 1845).

E. K. Scovill of West Troy, is of opinion that the erection of a bridge at Albany would be injurious to *the business of floating rafts of timber from Troy to New York* (pages 422, et. seq).

Wm. W. Peters of the state of Iowa, formerly boatman of Troy, is of opinion that a bridge at Albany would ruin navigation above it (page 486, fol. 4054). 302

Alanson D. Agan of Troy, agent of the Troy eastern line, is of opinion that a bridge at Albany *would annihilate commerce at Troy* (page 516, fol. 6005).

Is opposed to a bridge, but does not know what "*hostility*" means (fol. 6008).

The ground of his objection is that the bridge can not pass all the boats doing business above, and at the same time pass rail road trains (page 518, fol. 6012). 303

Can't tell how many vessels there are to pass.

Never saw a bridge without obstructions. *But the only bridges he ever saw are those at Boston* (page 520, fol. 6025).

Don't know how many vessels could pass a bridge at Albany in 24 hours (page 521, fol. 6030). 304

His opinions are *speculative*, partly. Never passed a draw bridge. *Don't know how the bridges at Boston operate. Don't know how long it takes to open and shut them* (page 522, fol. 6034; vide page 523; see answer to question 69, page 526, fol. 6051).

Nelson Bearse, Barnstable, Mass., has passed through draw bridges at Boston, and is of opinion, so far as his experience is concerned, that draw bridges are detrimental (page 531, fol. 6079). 305

A bridge at Albany would be *detrimental.*)*For reasons*, vide answer to question 11, page 533, fols. 2486, 2487).

306 Boston bridges and business above described (pages 534, 535 to 538).

A bridge at Albany built as proposed would be much less obstruction than bridges at Boston (page 538, fol. 2513).

JAMES A. DUNOUT of West Troy, captain of the steamer Saratoga, towing for T. A. Tillinghast & Co.'s line, considers that a bridge at Albany would *annihilate* navigation

307 above it (page 540, fol. 2521).

The most *prominent difficulty* is the insufficient room at Albany, for the accommodation of the business, the dangers of collisions, the difficulty in getting through case of a vessel approaching the draw from below, in time of a *freshet*, &c. (fol. 2522. Vide also pages 560, 561, 564).

Has passed bridges at Troy and Hartford (fol. 2528).

308 This witness is *hostile* to bridges, but *not* to tows, *which block up the river* (fols. 2530–31).

He says blocking up the river with tows "*is navigation, and any captain of a steamer will drop his boats in tow to make room if necessary, and as a general thing we string out our tows in hawsers when we get into narrow places, or where the navigation is dangerous, and make room for other vessels to pass*" (fol. 2531).

309 If in such case he was *detained for hours*, he would consider it but *a temporary obstruction* (fol. 2533).

Does not consider it prudent to take a tow of more than 64 feet wide between Troy and Albany (fol. 2540).

He never saw a vessel pass a draw as wide as the one at Albany (fol. 2570).

Lights at night would be of no advantage in passing a

310 draw (fols. 2580, 2582, 2584).

It would not help the matter if the draw could be *seen three miles off* (fol. 2586).

His opinion as to bridge at Albany is not founded upon his experience but from "the general repugnance of boatmen to pass draw bridges" (fol. 2589).

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The ferry boats at Albany crossing the river, are more in the way of vessels than those going up and down (fol. 2615).

The foregoing witnesses embrace all who give *opinions* on the part of the complainant, as to the effect of a bridge at Albany. Their evidence is very voluminous, and in most cases to understand the *value* of the opinions given, their whole evidence must be carefully read. The reference to their testimony here is mainly to show in very general terms the *theory* upon which these opinions are uniformly based, to wit, assuming *heavy freshets, high winds, a crowd of vessels, and the draw of the bridge closed*, and upon this state of things, predicting *probable* dangers and difficulties in navigation.

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It is to be observed also, that the one idea most prominent to the imagination of the greater number of these witnesses, is the apprehended danger to the *local* interests of Troy, which, while it may be highly commendable in them as citizens of the locality supposed to be in danger, does not qualify them to pronounce an impartial and unbiased judgment.

313

They are most of them active partisans in the bridge controversy, with little or no experience in passing draw bridges, and who regard all commerce which seeks passage *across* the river as *illegitimate*, who insist that the 135 passengers that daily struggle over the sand bars between Albany and Troy in the Skiddy and Rip Van Winkle, are entitled to vastly more consideration than the 4000 who pass the ferry at Albany, and who *solemnly swear*, that the delay of a Troy barge or a Philadelphia plug for 5, 10 or 15 minutes at a draw bridge at Albany, will "*annihilate*" the commerce at Troy, although the same vessels, with others, embracing all that are included in the designation of "Troy commerce," lie oftentimes for six or twelve hours on the sand bars, waiting for the tide to float them away without doing essential damage to this commerce of "great variety, expansion and prosperity."

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Evidence is given also of the *actual* number of passages at the *Troy bridge*, during the seasons of 1856 and 1857.

Complainants' Depositions, pages 430 to 484.

316 Between April 4th and Dec. 8th, 1856, there were 1392 passages.

Between March 18th and Dec. 19th, 1857, there were 3196 passages. The whole time is 275 days, and the daily average is 12.

317 On the 16th Sept., 1857, there were 44 passages (page 472); July 25th, 27 passages (page 464); July 23d, 31 passages (page 463); July 8th, 34 passages (page 461); June 29th, 25 passages (page 459); May 30th, 30 passages (page 451); May 15th, 31 passages, and May 14th, 35 passages (page 450), and many other days with about the same number.

318 An examination of the statement of passages in detail, will show, that generally the opening of the draw, the passage of the vessel and closing the draw, is performed in about *five* minutes. The detention of the vessel is of course less.

Complainant's Depositions, page 515, fol. 5096.

319 In some instances, depending upon various adverse circumstances, more time is taken — but such occurrences are mostly attributable to the fault of the navigator, unfavorable location of the draw, and the insufficiency of water; and this is shown by the testimony of the bridge tenders, by whom the account was kept. Charles Teson (page 503), and James Sanford (page 510).

During the two years, but few cases of accident occurred, and those were generally not the fault of the bridge, as is shown by the testimony of the two witnesses above referred to.

320 Under ordinary circumstances there is no difficulty in vessels passing through the bridge.

Evidence of Charles Teson, Complainants' Depositions, page 509, fol. 5070.

The ordinary detention to sloops and vessels *dropping through*, is from 5 to 10 minutes. But to steamers and vessels towed through *there is no detention, except in low water.* 321

Evidence of James Sanford, page 511, fol. 5079.

Steam boats, canal boats, barges and sail vessels in tow, well manned and steered, go through this draw without material hinderance or detention.

Evidence of James Sanford, Complainants' Depositions, page 515, fol. 5097.

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It will be remembered that most of the opinions, *adverse* to the bridge at Albany, profess in a great degree to be founded upon the experience at Troy; and it can be seen by an inspection of every day's record of passages, and the evidence of the bridge tenders, how little foundation the actual experience at the Troy bridge justify the extravagant and extraordinary opinions delivered against the bridge at Albany. 323

As a general rule, vessels propelled by steam, pass without difficulty, or detention, or accident. Accidents and detentions are rare exception, and usually arise from the fault of the navigator; and this is the result at a bridge inconveniently located, on account of the currents and channel, with a single draw opening of only 60 feet.

It is occasionally suggested that this bridge has "*annihilated*" all commerce above it, but there is no evidence to show that one vessel less has gone to Lansingburgh and Waterford in consequence of this bridge. If the docks in Troy *above* the bridge have been vacant since its erection so is the fact as to docks *below* the bridge. 324

Complainants' Depositions, evidence of Getty, pages 315, 316, fols. 1406, 1407, 1408.

325

The population *above* the bridge has *increased* (page 177, fol. 766).

And there is a much more satisfactory reason than the erection of a bridge for the transfer of business below, and

that is the facilities afforded by docks at West Troy convenient to the canals for the transaction of the lumber business, by means of which the inconvenient docks at and
326 above the bridge, with the currents and sand bars in the channel adjacent thereto are avoided.

It appears also that notwithstanding the sloop lock and the bridge, most of the canal boats from the Champlain canal for Troy enter the river at Waterford and pass both bridge and lock rather than follow the canal to West Troy and enter the river below both

327 There is considerable business between Waterford, Lansingburg and New York, not so much done by *sail vessels* as formerly, as *barges* have taken the place of sail vessels here as elsewhere on the river.

Complainants' Depositions, page 159, fols. 681, 682.

There is no ground for the assumption that the commerce above the bridge is any less than formerly—the only change
328 is in the character of the vessels. If because sail vessels disappear it is to be inferred that the extent of commerce is diminished, then it is clear that the commerce of Troy is gradually being extinguished, for sail vessels to that port are substantially obsolete.

On the part of the defendants there is a great weight of *opinion*, to the proposition that a bridge at Albany con-
329 structed pursuant to the charter, operated with skill, having the facilities for aiding the passage of vessels which the act requires, will not present any material impediment to the navigation of the river. Neither does it rest upon *opinion* merely, but to this is superadded the result of observation and experience by men of large practical and scientific knowledge, who do not testify with the prejudices engendered by participation in an angry and exciting con-
330 troversy.

Of navigators upon the Hudson, well acquainted with its business end navigation, the following witnesses say that

such a bridge as is proposed to be erected, will present no substantial obstruction to the passage of vessels.

331 PHILIP P. STAATS of Greenbush, in the county of Rensselaer (defendant's depositions, pages 160 to 174), who has been engaged for thirty years in every species of vessel, says the impediment of a bridge would be very slight if any.

332 HENRY BEDELL of Greenbush, has for eighteen years been engaged in the navigation of the Hudson at and about Albany, with steam boats, barges, sloops and canal boats and for twelve years as captain and pilot, gives a similar opinion.

Defendant's Depositions, page 174 to 189.

333 WILLIAM I. ENSIGN of Greenbush, pilot of the steamer New World, one of the largest passenger steamers navigating the river, and who has been engaged as pilot *nine* years, is of opinion that a bridge would be no material obstruction, and under ordinary circumstances the bridge could be passed as easily and safely as other places in the river of the same width of channel, and states what is obvious to most men, that under equal circumstances vessels may be navigated through spaces of equal width with the same facility and safety.

Defendant's Depositions, page 191 to 202.

334 WILLIAM H. MATSON of Greenbush, navigator on the Hudson for *twenty-eight* years, in various capacities of mate, pilot and captain of sail vessels and steam boats, says that the proposed bridge would present no substantial impediment or obstruction.

Defendant's Depositions, page 202 to 207.

335 EDMUND ELLIS of Albany, who has navigated the Hudson in all capacities with sloops, steam boats and propellers, through bridges, locks, slips, narrow channels, and between piers, abutments, and vessels aground and afloat, says that

the passage of a bridge could with the exercise of the same care be effected with the same facility and safety as the navigation of other channels of the same width.

336 Defendant's Depositions, page 208 to 214.

HENRY LEWIS of Schodack, in the county of Rensselaer, for *thirty* years engaged in the navigation of the Hudson and other rivers, with sloops, steam boats, &c., is of opinion that a bridge at Albany will not prevent any substantial impediment to navigation.

Defendant's Depositions, page 215 to 221.

337 A minute examination of the evidence above referred to, in detail will show that the opinions expressed are founded upon large experience, and are the result of an intelligent view of all the contingencies of navigation.

They present clearly what to most men is an obvious proposition, that under ordinary circumstances, a vessel, or a tow of vessels, may be safely navigated through the draw 338 of a bridge of sufficient width, with the same facility as through any other space of equal extent.

In addition to the evidence of these navigators, there is the testimony of sundry civil engineers of great reputation for scientific knowledge, and of very extensive practical experience (and others of different occupations), who are of opinion that a bridge at Albany is entirely feasible, and 339 can be constructed and operated so as not in any material respect to interfere with navigation; to wit:

WM. J. MCALPINE, of Chicago, civil engineer.

Defendant's Depositions, pages 77 to 103.

ELLWOOD MORRIS, of Philadelphia, civil engineer.

Defendant's Depositions, pages 357 to 382.

340 EDWIN F. JOHNSON, of Middletown, Conn., civil engineer.

Defendant's Depositions, pages 382 to 411.

CHARLES L. MCALPINE, of Chicago, civil engineer.

Defendant's Depositions, pages 115 to 118.

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BENJ. B. BRAYTON, of Davenport, Iowa, civil engineer.
Defendant's Depositions, pages 135 to 141.

JOHN E. HENRY, of Davenport, Iowa, civil engineer. 341
Defendant's Depositions, pages 141 to 144.

ROSWELL B. MASON, of Dubuque, Iowa, civil engineer and contractor.
Defendant's Depositions, pages 144 to 155.

WARREN COLBURN, of Toledo, Ohio, civil engineer.
Defendant's Depositions, pages 299 to 305.

DANIEL L. HARRIS, of Springfield, Mass., civil engineer. 342
Defendant's Depositions, pages 305 to 314.

ALEXANDER H. SHULTZ, of Fishkill, Dutchess county, steam boat proprietor, navigator, harbor master of New York, &c.
Defendant's Depositions, pages 314 to 320.

LAWRENCE DEARSTYNE, of Greenbush, Rensselaer county, 343
ferry pilot at Albany.
Defendant's Depositions, pages 320 to 334.

THOMAS L. GREEN, of Albany, rail road agent.
Defendant's Depositions, pages 334 to 350.

SMITH BRIGGS, of Albany, rail road agent.
Defendant's Depositions, pages 350 to 357.

ANDROS B. STONE, of Chicago, bridge builder. 344
Defendant's Depositions, pages 45 to 58.

HIRAM WHEELER, boatman, New York.
Defendant's Depositions, pages 230 to 241.

HENRY WILSON of Philadelphia, captain of a propeller.
Defendant's Depositions, pages 241 to 254.

WILLIAM LYONS, of New York, pilot at Sandy Hook and 345
New York Harbor.
Defendant's Depositions, pages 254 to 273.

WM. R. GIBSON, of Williamsburgh, ferry pilot.
Defendant's Depositions, pages 274 to 282.

EDWARD HOPE, of Williamsburgh, New York harbor pilot.

Defendant's Depositions, pages 282 to 295.

346 If this case was to be determined on the fact, by the weight of opinion merely, it is submitted that it is clearly with the defendant. On the part of the complainant, but one class of men testify, and they are taken mainly from Troy, from the most prejudiced and excited opponents of a bridge at Albany.

347 On the part of the defendant, men of different professions and occupations; of scientific knowledge, practical experience, and extensive observation of the operation and effect of draw bridges — give evidence. They are not connected in feeling or interest with the bridge controversy. If it can be properly said that any of them have *prejudices* in favor of draw bridges, it is certainly not the navigators upon whose testimony we rely. If those who are civil engineers and connected with rail road enterprises, can be 348 said to have contracted views favorable to the bridging of navigable streams for rail road purposes, it is certain that no particular connection with this controversy is calculated to bias their judgment. Their views and opinions are the result of scientific knowledge, combined with actual experience, which enables them to speak with intelligence and confidence.

349 But the *fact* that a bridge at Albany, may be so constructed and operated, as not to present any material obstruction to navigation, does not rest upon opinions merely.

As to what may be judicially regarded a *material* and what an *immaterial* obstruction or impediment, opinions may differ, and the precise line of division may not be clearly 350 defined. It has, however, been judicially determined, that a dam with a lock, or a bridge with a convenient draw through which vessels may pass, is not an *obstruction* to navigation.

To detain vessels for a few minutes at a draw or lock, is

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not a *material* obstruction in any sense—judicial, legislative or commercial.

A detention or delay to vessels, which will not seriously affect the *business* of navigation, or any business which depends upon it, can not be material, and whether a given 351
delay of vessels will seriously affect business, may in some measure depend upon the manner in which it is conducted; and the question how far its successful prosecution depends upon the exact and accurate movement of vessels, and in respect to this question, so far as it is involved in the present case, the following suggestions are submitted:

First.—That the business of the Hudson river, at and 352
above Albany, does not depend upon any accuracy or precision in the movement of vessels, is entirely apparent. Temporary delays and occasional disaster, are incident to all water navigation. The wind and the tide affect it more or less, according to circumstances, in respect to which no certain calculations can be made.

The business of the river above Albany, is conducted 353
with constant reference to these exigencies. Delays of greater or less duration, are of common—even of daily occurrences.

To achieve the passage of sand bars, passenger steamers and tows wait for hours for the rising of the tide. They frequently run aground above and below Albany, and remains so for six and twelve hours, until the return of high 354
water enables them to pass on. This is not occasional but frequent for some seasons of the year. In high freshets, navigation is dangerous and impracticable, and vessels lie at their docks until the water subsides.

Yet with all these delays, it is said, the commerce of Troy has prospered, and if so, delays of vessels for hours at the docks or at sand bars, do not "*annihilate*" nor *materially* injure it. Can it be said, that a delay, of five, ten, 355
thirty or even sixty minutes, at Albany, for passing a bridge (if any such occurrence was likely to be common), will

more *materially* injure its commerce, than the same or much greater and more frequent delays on sand bars.

356 *Second.*—The location of the bridge at Albany, is vastly more favorable to its successful operation than the bridges at Troy, Rock Island, Chicago and various other places.

The channel of the river is wide, the current direct and uniform, and in ordinary water is very inconsiderable, and not in the highest freshets as rapid as the current at Rock Island in ordinary water. Proper piers will not create sand bars, and if created may be removed by dredging.

357 *Third.*—The width of draws, if only one 180 feet, if two as is more probable, 110 feet each in the clear, afford ample space for the widest vessels to pass. The draw of 110 feet is 40 or 50 feet wider than the widest vessel passing above; and from 60 to 90 feet wider than the ordinary vessels passing. Two such openings are presented, and at one opening, if there happen to be vessels passing each
358 way, one or more may pass up through one draw, and a like number pass down through the other, without difficulty, delay or danger, under ordinary circumstances.

The draw of 110 feet is wider than the ordinary tows which are or can be safely navigated between Troy and Albany, and they may ordinarily pass with ease and facility. If at times the tows are wider than the draw (and such
359 an event, if ever, must be exceedingly rare), the tow on approaching the bridge may be diminished with the same safety and facility that they are diminished when approaching narrow channels in the river, vessels aground, or other obstacles, which is of freequent occurrence, and unattended with difficulty. These tows being (in number of vessels) mainly composed of canal boats, which are usually placed
360 on the extreme outside, are easily cast off, or dropped behind (diminishing the width and increasing the length of the tow), and being easily managed, may be conducted under the bridge, or made fast to a dock as will best suit the exigencies of the occasion. These boats are also easily managed by the use of the ordinary setting pole, with which

all canal boats are provided, and by means of which canal boats which enter the river from the Champlain canal at Waterford, are propelled on and across the river to the sloop lock in the State dam above Troy. 361

In respect to the larger tows for New York now made up at Albany, above the site of the bridge, the evidence is clear, that at times the manner of making them up and the space occupied for that purpose, tends to the obstruction and delay of other vessels. At such times these large tows are a nuisance in the river, and there is room to make them up below the bridge, or they may be partially made up above the bridge, pass through and additional vessels added, as the smaller tows arrive from Troy. 362

In times of high freshets or heavy winds, some difficulties may be experienced, but no greater than now happen, and as a general rule, at such times, navigation is practically suspended.

Fourth.—Properly constructed piers are not likely to tend to the creation of sand bars. Such is the opinion of Messrs. McAlpine, Morris and Johnson, engineers, competent from knowledge and experience to give a reliable opinion. By the construction of piers, the current will not be increased to any such extent, as will be likely to disturb the bottom of the river. The water way will not be contracted, for it is proposed and intended to enlarge it. 363

Vide evidence of Morris, Defendant's Depositions, pages 359, 360. 364

Besides, it is clear that the provision in the charter, that the company shall cause any sand bars, which may form, to be removed by dredging, affords all the guarantee which can be reasonably desired. All the witnesses agree, that this condition being duly performed, will remove any objection on this account, and it is obvious that there is no more difficulty in removing sand bars at the bridge, than above, where navigation is mainly dependent upon the use of the dredging machine. 365

The formation of ice dams, by reason of the piers, is another difficulty suggested; but practical experience does not
366 justify the apprehension of any such danger. No ice dams have ever formed by reason of the piers of the Troy bridge. Properly constructed piers operate as ice breakers, rather than facilitate the formation of ice dams. Ice dams usually form in shallow water, and then they disturb the channel. If they form in deep water, the channel is not disturbed. The water passes under the ice, and creates little or no dis-
367 turbance of the bottom below.

Delafield's report, Complainants' Depositions, page 658, fol. 3189.

Fifth.—It is shown beyond reasonable cavil, that the commerce at and above Albany, requiring the opening of a draw for its passage, can be accommodated by a bridge without difficulty and delay. There is nothing in the nature
368 of a draw bridge at Albany, which will render its management more inconvenient than at other places. It may be opened and closed in from one to two minutes. The space afforded for the passage of vessels, when the draw is open, is ample. The current is direct and uniform; the water deep, and navigation easy. With steam tugs to tow sail vessels through, it is inconceivable, that under ordinary circumstances, any substantial delay will occur. When we
369 undertake to imagine extraordinary circumstances, in the state of the river, as to freshets, winds or press of vessels at the bridge, we must also assume in the same connection, that navigation at such times will be either practically suspended, or that those who attempt to prosecute it will resort to extraordinary effort, to conduct it with success and safety, in view of all the extraordinary dangers or difficulties to be encountered.

370 The fact that at Chicago 150 vessels, and at Gray's Ferry, on the Schuylkill, 180 vessels, may and have passed these draws without difficulty or delay in a single day, and that at Chicago 100 pass daily on the average, during the

season, is better evidence of what number of vessels may, under more favorable circumstances be passed at Albany, than the opinion of a legion of witnesses of no experience at draw bridges. The bridge at Albany, in respect to favorable location, width of channel, rates of current, capacity of draw, the aid of steam tugs, will, according to all reasonable calculation, afford greater facilities for the passage of vessels, without inconvenience, danger or delay, than any draw bridge known to navigators, engineers or commercial men. 371

The number of vessels requiring passage of a draw will not ordinarily much exceed one-half the average passages at Chicago. Upon the most extreme claim made on behalf of the complainants, the number of passages will not exceed the daily average at Chicago. 372

There can be no reason to doubt but that every vessel on the river may be accommodated if the draw is kept open half the time.

Every rail road train probably requiring passage can be passed with the draw closed less than one-quarter of the time. 373

Sixth.—The fact that sail vessels are substantially extinct; that barges decrease, and canal boats are increasing, presents a case where the traffic upon the river and across it may both be accommodated without substantial injury to either. 374

SIXTH—Facts appearing in the case as to the effect of draw bridges upon commerce and business above, &c., &c.

There is nothing in this case showing that a properly constructed draw bridge, capable of being opened with reasonable facility, necessarily inflicts serious injury upon commerce and property above. 375

At Chicago, population, business and the value of property have continued to increase above its bridges.

Wm. A. Burton (complainants' depositions, pages 49 50, 52, fol. 215) says that property has increased in value
376 above the bridges with the increase of bridges.

J. W. Hibbard (complainants' depositions, page 56, fols. 230, 232) says that the shipping at Chicago has increased more than 200 per cent. in five years.

At Gray's Ferry over the Schuylkill, a very large and extensive business has grown up above the bridge since its erection.

Defendant's Depositions, pages 212, 243, 376 and 377.

377 *At Boston, on the Charles river*, although several draw bridges of inferior construction span the river, the towns above are improving in growth and manufactures, and have been for the last 8 or 10 years.

Complainants' Depositions, pages 535, fol. 2499.

There is nothing to show that the *bridge at Troy* has
378 caused one less vessel to visit Lansingburgh and Waterford, or that its commerce is now less than when the bridge was built.

Defendant's Depositions, pages 393, 403.

It is clear that the commerce above was never very great, from the nature of the river at and above the bridge as far as Waterford.

379 Population has increased at Troy, above the bridge.

Defendant's Dep., page 177, fol. 766.

Complainants' Depositions, pages 412–13, fol. 1891.

Green Island, *above* the bridge has, since its erection, largely increased in population and business.

Defendant's Depositions, pages 178, 413.

380 If since the erection of the bridge at Troy, the value of property above, or business upon the docks has increased or changed its location, it can be ascribed to other causes than the erection of the bridge, and the principal cause is,

the side cuts of the canal at West Troy, and the facilities there afforded for the convenient transaction of business.

Complainant's Dep. (Ev. of N. H. Noyes), pages 152, 157, 381
" " (Ev. of H. Swarthout), page, 169 to 174, and 176 to 178.
" " (Ev. of R. Robinson), page 226.
" " (Ev. of Isaac R. Getty), pages 316, 325 to 328.
" " (Ev. of Charles Brownell), page 413.

Since the erection of the bridge at Troy, docks *below* have been unoccupied for business purposes as well as docks *above*. 382

There is considerable business above, but not so much by sail vessels, as barges have taken their place.

Complainants' Depositions, page 159.

Whether the general result of business above is more or less since, than before the bridge was erected, does not appear. 383

And it must necessarily be, that whether a draw bridge will or will not injuriously affect navigation and business and property above, must depend upon the character of the business, and the character of the bridge. If a bridge affords reasonable facilities for the passage or vessels, there is no reason why business above should suffer.

384

SEVENTH—Facts respecting the action of the government of the United States, touching the Hudson river at and above Albany.

Troy has been made a port of delivery, by act of Congress.

Appropriations for the improvement of navigation of the Hudson have been made by Congress. 395

In 1834,	$20,000.
" 1836,	100,000.
" 1837,	100,000.

In 1838,------ ------ ------ ------ $100,000.
" 1852,------ ------ ------ ------ 50,000.

See Complainants' Depositions, pages 568, 569.

386 Efforts have been made from an early period, to improve the navigation of the Hudson, both by the state and national governments. As early as 1797, the Legislature of New York made appropriated for the improvement of the river, and up to 1818 had appropriated and expended $148,707.94.

Complainants' Depositions, page 628.

387 Various other proceedings were had by the state from 1818 to 1831, respecting the improvement of the river and various amounts of money expended. In 1831 the attention of Congress was called to the subject (page 637).

The first appropriation was made by Congress in 1834, 388 and continued for various years until 1839, when operations were "suspended in consequence of a change of policy in the national councils on the subject of internal improvement" (fol. 3096).

"After the abandonment of the works by the general government in 1839" (fol. 3099), the citizens of Albany expended $1,500 in 1840, on the Castleton bar.

389 In 1845 $4,000 was expended by Albany and Troy.

In 1852 the Legislature of New York appropriated $10,000 for the removal of the Castleton bar, and the work proceeded under the direction of Mr. McAlpine, State Engineer (page 642).

In 1852, Congress appropriated $50,000, and Major Delafield made a report upon the manner in which it should be 390 expended, which did not meet the approval of the department, and nothing further has been done by the general government.

The U. S. arsenal is situate 5 miles above Albany, on the west bank of the river, the works for which were commenced in 1816, and have been increased, until the whole expenditure amounts to $520,000 (page 492).

EIGHTH—Claims made respecting the Manufacturing Business of Troy, &c.

391 There is evidence given to show the extent of manufactures in the city of Troy and vicinity, and it is in form of an estimate by Charles Brownell.

Complainants' Depositions, pages 408 to 421.

It is not perceived what particular pertinency it has to the questions involved, unless it is used to magnify the amount of Troy commerce; but it does not appear to employ any other vessels than those spoken of by Mr. Hazard.

392 This statement is also very much inflated, as will appear on examination. Various firms with a large amount of business at West Troy and Green Island, in the county of Albany, are appropriated to swell the amount of manufacturing business of *Troy* (see pages 419 to 421).

Of 9,147 persons claimed to be employed in manufacturing business (fol. 1918), 4,140 are employed in making 393 shirts and collars (fol. 1855).

Not one item in the statement presented, *is known to be true* by Mr. Brownell who prepared it and by whom it is verified (page 410, fol. 1954).

It appears that at Chicago, in consequence of the great number of persons requiring passage *across* the river, no *ferry boat* could accommodate them (at some points) without serious injury to the navigation up and down the river 394 (complainants' depositions, pages 20, 21, fols. 79, 80), and that at these points draw bridges are a less obstruction than a ferry would be.

At Albany, the passage of ferry boats is often impeded by vessels going up down, and sometimes ferry boats interfere and impede the progress of such vessels.

These facts suggest this question: In a case where the 395 passages over a navigable river, by means of a ferry, are so numerous and extensive as to seriously impede and interrupt vessels navigating up and down the river, under a coasting license, whether the right of passage over by state

license, is subservient to the right of passage up and down, which is given to vessels sailing under a coasting license.

396 If a ferry may be maintained by state authority, which seriously impedes navigation up and down, is a bridge erected as a substitute under state authority, which presents less obstruction to navigation than the ferry, legal and proper?

On the part of the defendant it is claimed, that the following propositions of fact, are clearly established, to wit:

397 *First*—That the state of the currents, width of channel, character of the bed of the river, at Albany, affords peculiar facilities for the location of a draw bridge, through which vessels navigating the river may pass with reasonable facility.

That the erection of the piers necessary to support the bridge, will not tend to the creation of sand bars or ice

398 dams, which will interfere with navigation.

See preceding statement, pages 14, 15, 16.

That above Albany the channel of the river, through which all the commerce has to pass, is narrow and devious and in some places, at low water, is not to exceed 100 feet, wide, and vessels ground frequently in attempting to pass.

399 That in view of this imperfection, large vessels and tows, from Troy and West Troy, are obliged to start with reference to the state of the tide, to enable them to get over the sand bars.

And that substantially there is no natural navigation in the river between Troy and Albany, and the same is kept open by means of the almost constant use of a dredging machine, operated under command of Capt. Smalley, and

400 owned by the corporation of Troy.

See statement, pages 16, 17, 18, 19, 20, 21.

Second.—That as a general rule, a small class of vessels navigate the river between Troy and Albany. Few sail

vessels venture above. The business is principally done in canal boats and barges, towed by small steamers. Sail vessels are substantially obselete. Barges are decreasing and canal boats are increasing. Much the largest number of 401
vessels on the river at and above Albany, are canal boats, which, with a large share of barges without masts, and many of the steamers, may pass under a bridge elevated 20 feet above ordinary water without inconvenience, without the opening of a draw.

See statement, pages 21 to 24.

That the commerce of Troy is not as great by one-half 402
as the amount claimed for it, and may easily be accommodated by a proper draw bridge.

Statement, pages 24, 25, 26, 27.

And that but for the business which the canals furnish, by means of the side cuts at West Troy, the commerce of the river above Albany would be very inconsiderable.

Statement, pages 28, 29. 403

That the number and kind of vessels which have occasion to pass the bridge at Albany, may be accommodated without difficulty at the draws with the facilities provided for in the charter of the Bridge Company. The daily average of draw openings required, will fall considerably below 100, and will not ordinarily exceed half that amount.

Statement, pages 31 to 40. 404

That the smaller tows of vessels from Troy may pass through the draws of the bridge, and there is room and convenience for making up the large New York tows below, and by changing the location the harbor of Albany will be relieved from the nuisance to navigation which the making up of the large tows create.

That tows wider than the draw of the bridge may be 405
diminished in width by detaching vessels so as to pass the draw without difficulty, and this practice is constantly re-

sorted to now in approaching narrow channels, or vessels aground in the river (page 39).

406 That under no circumstances is it probable that the draw of the bridge will require as many daily openings to accommodate the commerce as are easily accomplished at other draw bridges of less favorable construction than the proposed bridge as Albany.

Statement, pages 31 to 40.

407 That the steamers and barges now navigating the river at and above Albany may in most instances, with very little difficulty and at small expense, have their upper works so modified that they can pass under the bridge without any opening of the draw, and the space afforded for passage is full as wide and wider than the spaces through which they are obliged to pass between Troy and Albany, and the navigation much more safe and convenient (page 40).

408 *Third.*—That a very large trade and travel pass the river by means of a ferry with inconvenience and expense. That delays and dangers are frequent. That the ferry is not equal to the business now and that it is constantly increasing, and that for the better accommodation of this trade and travel the public interest requires a bridge, even if by it vessels are in some instances temporarily delayed and the business upon the river in some small degree incommoded.

409

Statement, pages 41 to 47.

Fourth.—That actual experience with draw bridges at various points in the United States, as to their effect upon commerce and navigation — the facility afforded for the passage of vessels of all classes, and the trifling inconvenience to vesssels in making the passage — the number actually passed daily furnishes clear and conclusive evidence that the bridge at Albany, operated with skill, having the aid of

410

steam tugs, will present no material obstruction to navigation.

Statement, pages 48, 49, to 54.

411 That the opinions given, adverse to the feasibility of a bridge at Albany, are the conclusions of prejudice and inexperience, and are in conflict with undisputed facts and common experience. They are also given with reference to a state of the river, which is of uncommon and extraordinary occurrence, and not based upon the ordinary condition of navigation.

412 Statement, pages 55 to 64.

That the opinions of disinterested and experienced navigators, of engineers and men of practical knowledge of navigation — as well as undisputed facts, prove, that a bridge at Albany, may be so constructed and operated under the charter, as that the rail road business and traffic across, may have reasonable accommodation, and the navigation of the river not impeded in any essential or material degree. 413

Statement, pages 65 to 72, et seq.

Fifth.—That draw bridges of proper construction, do not ordinary inflict injury upon commerce and property above. At Chicago, Boston, Gray's Ferry and Troy, business and population increase above the draw bridges, although affording a narrow space for passing vessels, and having no aid from steamers in the passage. 414

Statement, pages 76, 77.

Sixth.—The government of the United States has done nothing with the Hudson river at or above Albany, to exclude the jurisdiction of the state over it. All the attempts by the United States to improve navigation, were abandoned in 1839, and have not been resumed. Since then, all actual effort to improve or preserve the navigation has been made by state authority or by private persons. 415

Seventh.—Upon the whole case, it is apparent, that a strong necessity for a bridge at Albany exists, for public
416 convenience. That it may be constructed without particular injury to any local interest or business, dependent upon river navigation. That the Hudson is exclusively a New York river. That the whole question as to power and policy is exclusively within the jurisdiction of the Legislature of the state of New York, and that the authority was discreetly exercised in authorizing a bridge at Albany, for the con-
417 venience of internal travel and traffic, which shall not present any substantial obstruction to the commerce of the river.

JOHN H. REYNOLDS,
Of Counsel for the Defendant.

3857.

THE SOVEREIGNTY OF THE STATES OVER THEIR NAVIGABLE WATERS.

ARGUMENT

OF

DANIEL D. BARNARD,

IN THE

ALBANY BRIDGE CASE,

SUBMITTED TO THE

Supreme Court of the United States,

AT THE TERM HELD IN THE

CITY OF WASHINGTON,

IN FEBRUARY, 1860.

ALBANY:
ATLAS & ARGUS PRINT.
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281

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IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN EQUITY.

ROBERT D. SILLIMAN,
vs.
THE HUDSON RIVER BRIDGE CO.

FREDERICK W. COLEMAN,
vs.
THE SAME.

ARGUMENT OF D. D. BARNARD FOR DEFENDANT.

I.

This case comes before the Court in a way to involve questions of a good deal of magnitude and interest; one of which, at least, and that the highest of all in importance, has never, so far as I know, received the deliberate consideration of this Court.

The particular question referred to, has relation to the extent to which the authority of Congress, under the power "to regulate commerce," may be carried in asserting a supremacy of sovereignty and jurisdiction in the Govern-

ment of the United States, both on the waters and on the land, within the territorial limits of the several States, over the sovereignty and jurisdiction of the States. To that question I shall ask leave to call the special attention of the Court before concluding my argument.

This case arises from the action of the Legislature of the State of New York—the supreme power in the State—taken to establish a bridge across the Hudson River at Albany. The Act for this object was passed in 1856, and a supplementary Act in 1857. The State proceeds by a mode usual in the States in prosecuting their works of public improvement—by incorporating a Company with authority to erect a bridge, under the special limitations and instructions of the Act of Incorporation.

The State of New York, as everybody knows, beginning early, has accomplished a good deal in the way of public improvements. Having the Bay of New York, with the commercial emporium of the country seated upon its shores, and having the Hudson River ascending from it, and navigable for vessels and steamers of large size for 150 miles—a great highway of commerce—she early adopted, and has executed, plans by which she has extended this water highway, by a grand system of artificial rivers, through her entire territory, north and west; and has thus brought her great river and bay, opening to the sea, and her great commercial city, through a thoroughfare of navigable waters, into a direct commercial connection with a foreign country of vast extent on her northern boundary, and a chain and system of States of the Union, actual and prospective, in the boundless West—where still "the star of empire" seems to take its way.

Already the connected commerce on these navigable waters of the State, natural and artificial, is immense. With the completion of the enlargement of the canals, it cannot fail to be greatly increased. As a valuable portion of that which passes on the Hudson, in connection with the

286 3

canals, employs the river above Albany, it is the highest interest of the State to take care that the navigation of the river at and above Albany, as well as below, shall be preserved.

But the State has highways of commerce on the land as well as on the water. Besides its common roads and turnpikes, it has an immense system of railways, stretching through the State by various routes, constructed at vast cost, and bearing vast amounts of commerce and travel. The great central line of this system of railways connects New York with Buffalo, and the almost limitless West, and crosses the river at Albany. Other lines, one coming westward from Boston, and another coming southward from Canada, and the States north and east, also cross the river at Albany.

Ferries have been established at Albany from the earliest time, and always maintained under colonial and State authority. At the present time, besides two steam ferry-boats for common use, and kept in almost constant motion, there are two others which have thus far served, very imperfectly of course, to supply the broken link in the otherwise continuous lines of railway just referred to. Nearly 4,000 passengers cross the river daily in connection with these railways—a good deal more than a million a year, and more than 500,000 tons of freight. Ferry-boats afford very inadequate and inconvenient means for a business of such magnitude.

The State finally concluded, in 1856, that the time had come—the population of the State having run up to a sum greater than that of the whole Union at the Revolution, and the movement of property and persons on her highways of commerce, being much greater than in ordinary proportion to the population—when better facilities ought to be afforded, and were, in her judgment, imperatively demanded, for so much of this movement of property and persons as must traverse the Hudson at Albany.

She determined, therefore, to establish a bridge at this point. She believed that a bridge could be so constructed that while it would afford increased facilities for the traverse of the river, it would still leave the navigation of the river free for all useful purposes, with no other inconveniences than such partial ones as must always arise, to some extent, in works of this character, and which, by the very necessities of the law of general improvement and progress, must be submitted to, in consideration of the just accommodation required to be afforded to other public interests, quite as important as those to which such partial inconveniences may apply, and equally entitled to the fostering care and protection of the government.

The State was the proper guardian of both interests, and of all interests affected by the measure, certainly to the extent to which the domestic commerce and travel of the State were concerned. It acted for both interests; and for both interests in that ampler view which embraces so much of the foreign commerce of the country, and of the commerce between the States, as moves upon, or traverses the river at this point, and in the protection and preservation of which the State of New York has a deeper stake, certainly than any other State, and than a good many States combined.

It is not an unimportant consideration in this connection, that the immense interests involved in the Postal and Military systems of the United States, coming within the State of New York, do naturally, and must of moral necessity, seek and employ the same channels of communication, and the same means and facilities, artificial as well as natural, for traversing the State, as the commerce of the State employs.

I think it may be said, without fear of gain-saying, that if the Government of the United States had undertaken to make post-roads and military roads for itself in the State of New York, and if it had gone further, and undertaken a

grand system of internal improvements in this State by making roads, canals and railways, for promoting and facilitating that foreign commerce, and commerce between the States, which it is its province to "regulate," it could not have devised a system of improvements more perfectly fitted to all such national uses, than that which has been prepared by the State alone, under its original and undoubted power to make roads, canals, railways and bridges, not in conflict with the Constitution of the United States or any law of Congress, for the benefit of the domestic interests of the State, and of the commerce belonging to or passing through it.

The State has believed that its system of public improvements was very incomplete without the addition of a bridge at Albany. And if the State had not embarked in this enterprise, and if the Government of the United States was competent to undertake it, and could have done so with propriety under any power it possesses, I think Congress could scarcely have done anything, on the same scale, of greater usefulness, or of more pressing importance, for the national objects under its charge within the State of New York—for its post system and mails, for military uses, and for whatever might facilitate foreign and inter-State commerce in this quarter of the Union—than itself to construct just such a bridge at Albany as the State now proposes to establish.

This Court will not presume, nor be lightly convinced, that the State has entered on this enterprise without due consideration of all the interests that may be affected by it. Nor will it assume, or be easily persuaded, that it is itself a better judge than the State can be, however enlightened by any testimony which interested parties may bring before it, of the various questions, physical and economical, involved in it. These same parties, be it remembered, and all parties opposed to the measure, as well as those in its favor, have been heard, with whatever testimony they chose

to offer, before appropriate committees of the Legislature, before the enterprise was adopted.

Now the Court has the authoritative and formal announcement in the Acts of the Legislature of New York authorizing the bridge, and which I know it will take pleasure in treating with all respect, that the State believes that a necessity had arisen for a bridge over the Hudson at Albany; that the time had come when it was its duty to provide for the transit over the river, by that means, of the great and growing press of commerce and travel seeking passage at that point; and that a bridge could be constructed under the directions, limitations and provisions of the Act of the Legislature, which would not obstruct, or materially impede or injure the accustomed use of the river for navigation at and above the bridge, or occasion any material loss or damage to individual property, or to the business interests of any locality or community whatever.

Can this Court, under any conceivable circumstances, be a better judge of these grave matters than the State, to which they would seem more appropriately to belong? Is it a proper exercise of judicial power in this Court—is it the exercise of a judicial power at all—for this Court to sit as a Council of Revision over the Acts of a State Legislature on such questions as these — questions fit only for legislative investigation and decision; when the only ground on which the Court can be asked to entertain them in the present stage of the business is, that at the end of its investigations, and its examination of 5,650 legal folios — more than one thousand octavo pages of closely printed matter— in the form of evidence, almost wholly speculative in character, it might reach a conclusion different from that at which the State had arrived in regard to the necessity, the general propriety, and the safety to the public interests, of a bridge at Albany.

This case first came to a hearing before his Honor Mr. Justice Nelson, in the autumn of 1856, upon a motion for

a Preliminary Injunction. On this motion, in July 1857, the State was laid under a Judicial Interdict in regard to the establishing of a bridge, as authorized and provided for in the Act of the Legislature, and has so remained now for two years and a half.

And this Interdict was laid, not because the Court had come to a conclusion, upon the proofs then before it, adverse to the right of the State to construct such a bridge as was proposed; not because the Court was of opinion that the State had misjudged in its estimate of the effect to be produceed by the bridge upon the navigation of the river; not because the Court was of opinion that the State had passed a law for this object which was in conflict with the Constitution, or any law of Congress; not because the party complaining had made out any case whatever against the sovereign right of the State in the premises; but because the Court, at some future day, and on further proofs, might be brought to conclude that the State had so far erred on the purely speculative question of the effect to be produced on the navigation, as that a conflict between the State law and some law of Congress might arise, or manifest itself, if the bridge should be established.

The mischiefs of this early, and, as it will be my duty to insist in this argument, entirely premature interposition of the Court in a case of this sort, are apparent in this very proceeding.

His honor, Mr. Justice Nelson, for whom I beg to say I entertain the highest respect, in the opinion delivered by him, on granting the Preliminary Injunction, declared that, "in his judgment, the real and turning point in the case is, whether, or not, * * * the draw or draws will furnish reasonable means to prevent any substantial obstruction to the navigation." On this question, which, in the hands of the Court, must be one of pure speculation, the Court doubts, and upon this doubt the State is laid under interdict, and yet, all the while, it was an admitted fact in

the case, that for three or more months in the year—always the most difficult and dangerous for the passage across the river—the navigation of the river is wholly closed by ice, during which the use of the bridge would be exceedingly important to the great interests intended to be secured by it, even if not allowed to use it at all for the rest of the year, and when, of course, no possible question of obstruction by the closing of the draw or draws, could arise.

I shall endeavor, by and by, to satisfy this Court that in any case where a question of conflict is made between a law of a State passed under an admitted power, and a law of Congress passed under another and a different power, and where no question of conflict arises on the face, or by the terms of the State law, it is quite time enough for the jurisdiction of the Courts of the United States to be brought to bear upon the case, when some actual conflict or collision takes place by some act, or the exercise of some authority, under the State law, of such a character as may authorize and lead the Court to pronounce that the two laws cannot stand together, and each have a reasonable and fair execution and operation, but that one must give way. That of course must be the State law, since the Act of Congress must have the supremacy which the Constitution assigns to it.

This case having been again heard, upon further proofs, before the Circuit Court, and the two judges sitting at that Circuit having divided in opinion, the case comes before this Court for final adjudication.

II.

The case before the Court is this:

An Act had been passed by the Legislature of New York, authorising the erection of a bridge over the Hudson River at Albany.

Before anything was done towards the actual erection of the bridge, this suit was brought.

The parties complaining are: first, a citizen of Troy, and next, a citizen of Massachusetts.

Both claim rights to the free navigation of the Hudson River, under a license from the authorities of the United States, for the coasting trade.

The suit in form, is against a Chartered Company, which is authorized to construct the bridge. In substance and effect, it is against the State of New York. It is the State that has undertaken to establish a Bridge over the Hudson at Albany, for the public benefit, and as a part of its system of public improvements. It has proposed to do this through the very usual and accustomed agency of an Incorporated Company.

The matter complained of in the case, is a public law of the State, authorising the erection of a bridge, when, according to the complainants, no such bridge can be erected without violating rights secured to them by a paramount law of Congress.

It is thus that the complainants make a judicial case for themselves before the Court. They claim personal rights under an Act of Congress—the Act passed for granting licenses to vessels for the coasting trade. Having possessed themselves of such a license, for vessels owned by them respectively, and being accustomed to pursue the coasting trade, under that license, on the Hudson River, as far as Troy, where a port of delivery is established by law, they claim the right of free navigation to that point, and they complain that the law of the State authorising a bridge at Albany, will, if carried into execution, result in obstructing that free navigation, to their personal injury.

But the complainants in their Bills, set forth other grievances besides their own, and they arraign the State of New York before this Court, upon grave charges of error, and of faults worse than error, in the measure under con-

sideration. They declare that the enterprise has been entered upon without any public necessity for it; that the public interests are well enough, and fully, subserved by existing facilities, without this bridge; that the State by this measure is sacrificing, or greatly injuring its own vast property and interests in the Erie and Champlain Canals; that individual property, real and personal, will be greatly and irretrievably impaired by it; and that the great manufacturing and other business interests, and property of the city of Troy, with its population of 40,000, and of the neighboring villages of West Troy and Green Island, with their population of 7,000 more, are about to receive great and irremediable injury at the hands of the State by this measure.

This rather serious arraignment of the State of New York before this Court, first by a citizen of Troy, and next by a citizen of Barnstable, in Massachusetts, discloses clearly enough who the real party in interest is, in this suit. The city of Troy does in this matter what she deems it for her interest to do, and nobody blames her for it. If she is more frightened than harmed, that is not an uncommon case. But, at least, we must not turn away our eyes from seeing that it is not so much the great public interests involved in the free navigation of the Hudson River which are represented by the nominal parties to this suit—in connection of course with the personal stake they have in the matter—as it is the alarms, if these are really felt, or the commendable aspirations and ambition of a particular community within the State of New York, numbering 40,000 out of the 3,500,000 of population, which the State has under its care and protection—a community which happens to have fixed the site of its beautiful domain a little too high up the river to catch all the advantages of commercial prosperity, and a little above the point where the State has thought that the public interests at large demanded that a bridge should be established.

Now I must take leave to say that the economical policy of the State in prosecuting this work of public improvement, and the effect that may be produced incidentally upon individual property, real or personal, or upon the general business interests of any particular city or community in the State, are not subjects fit to be presented to the consideration of the Court in this case, either with a view to invoke its condemnation of the policy of the State in this regard, or with a view to any influence such considerations might have upon the mind of the Court in deciding the proper and only judicial case before it.

No person could maintain an action in a Court of the State solely on the ground that the value of his property was deteriorated, or his general business interests injured, by any bridge, of any sort or description, which the State might authorize over the Hudson at Albany, so long as its authority over the subject as a sovereign power was not brought into question. Such general and incidental injuries to individual property, or to the business affairs of a particular locality, from the action of the State, in a work of public improvement, cannot have redress at the hands of the judiciary of the State. The redress, if any is to be had, or ought to be had, can come only from the legislative authority, upon the petition of the parties aggrieved.

If this bridge had been erected, and an action at law was brought on the ground of a claim of personal right to the free navigation of the river under a paramount law of Congress, the State Court might maintain that right. The action being at law, the recovery would be of damages in the particular interest secured to the plaintiff under the law of Congress, and nothing more. The action would be confined to the injury accruing from the interruption of his personal right to navigate the river. Injuries to property and interests which are in no way under the special protection of the general government, but remain under the guar-

dianship of State laws, could not be made the ground of an action.

No suit in Equity for an Injunction to prevent the erection of a bridge, could be maintained in a State Court at all. No State Court would sit to hear an application for an Injunction by a private party, against the State, or against its agents created to carry into effect a measure of public improvement, on the allegation that the act of the Legislature was in conflict with a paramount law of Congress, unless the alleged conflict was apparent on the face of the Act, or was clearly inevitable if the proposed measure should be carried into effect. It would refuse to lay its hand upon the State, or its constituted agents, in the way of judicial interdict, as an unauthorized, and unseemly exercise of judicial authority. It could exercise such an authority on no other ground than that the State was about to commit a public nuisance, against the United States, by placing, or authorizing, an encroachment or obstruction to navigation, upon its own soil and property in the Hudson River, while, as yet, nothing appeared to impeach the perfect authority and validity of the law of the Legislature, but an allegation that a conflict between that law and some act of Congress, not apparent or inevitable, from the face and terms of the law, might arise hereafter, if the measure of the State should be prosecuted to completion.

This Court, I suppose, can exercise no other or larger jurisdiction in this case than a State Court could or would exercise if the same suit had been brought originally there, and the Court can have no rule of decision, in the absence, or beyond the scope, of Congressional legislation, but the law of the State.

This suit in Equity for an Injunction to prevent the proposed bridge being erected, can only be maintained on the ground that it would be a public nuisance against the United States. If it would not be that, the complainants certainly cannot maintain their suit for the private injury they set up

as likely to arise from an interruption or impediment to their personal right to the free navigation of the river. The nuisance, if any, is to arise from an unlawful obstruction to the navigation of a public river. It will consist in this, and nothing else. It will be because the public of the United States, or at least such portion of the public as may, like the complainants, be armed with a supposed special authority from the general government to navigate the river, will be interrupted, or unlawfully impeded, in the use and enjoyment of this common right. It will not be a public nuisance against the United States, of which this Court can take notice, because the property or business interests of individual citizens of the State, or of any number of them, or of any particular community in the State, may be, or will be, injuriously affected as incident to the unlawful obstruction of the navigation of the river.

If then this Court, consenting to entertain this case on a Bill in Equity, (which I shall insist it ought not to do) should be of opinion that the proposed bridge, if erected, would be an unlawful obstruction to the free navigation of the river, as secured or guaranteed to the public, or a portion of the public, by the legislation of Congress, and therefore a public nuisance and offence against the United States, the Court, of course, if it thinks it has the power, will so decide. But the Court cannot be legitimately aided in reaching that conclusion by receiving suggestions, or proofs, to convince it, that the public policy of the State in this measure, as a State policy, was wrong, and that instead of benefitting, it would inflict injury on its own interests and its own people, unless its hand was stayed by the authority of this Court. Much less can the Court go beyond the jurisdiction which the legislation of Congress may be found to give it, in regard to the alleged public nuisance, to find a substantive ground of judicial action in any injuries charged, or likely to arise to the complainants, or to other citizens of the State of New York, in their

property or interests, as incident to the erection of the proposed bridge, and not arising from any direct violation of their rights of free navigation.

Quite the contrary of all this. The courtesy due to a State requires the Court, (so I presume it will think,) to assume that the State has acted wisely in this measure in respect to the proper interests of the State, and of its own people; that there is, as the Act of the State indicates, a strong necessity for a bridge at Albany—a necessity for which the State was bound to provide, if it could, in the way proposed; that the bridge would be of great and general benefit to the people of the State, and all others having occasion to use it; and that if incidental loss or damage should accrue from the measure to any, few or many, in respect to their private property or their general business affairs, the justice of the State may be relied on, with sure confidence, to redress their grievances.

The principle for which I contend here was fully recognized, I think, by this Court in the opinion delivered by Chief Justice Marshall, in the case of the Blackbird Creek Marsh Co. (Wilson vs. Blackbird Creek Marsh Co., 2 Peters R. 245; and 8 Curtis R. 105.) In that case, a dam had been thrown across a navigable creek by the authority of the State of Delaware, which of course cut off the rights of navigation, and any other rights and privileges, of all who had been accustomed to use the creek. "But this abridgement," said the Chief Justice, "unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance." In other words, a party claiming a right to navigate this Creek under the Constitution, or a law of Congress, may be heard in this Court to complain of the injury. And if the party establish this right of navigation so as to entitle himself to the protection of this Court, he may have his redress, but his redress must be confined to this injury. He cannot go

beyond this ground of claim, and ask this Court to entertain his complaints of other alleged greivances, or injuries to other property or business affairs, of his own or of other persons, not under the special protection of the general government, which may be unfavorably affected by the act of the State.

III.

If this case, instead of being looked at, as it must finally be, as necessarily involving the question of public nuisance, should be regarded as involving no judicial question, but that of the private and personal right of the complainants to the free navigation of the Hudson River, the Court I think, would see how impossible it is that this suit in Equity can be maintained. In this view, the case must turn strictly on the question of repugnance to the Constitution, or of a conflict of laws, as between the parties to the record, one party claiming rights under the Constitution of the United States, or a law of Congress, and the other claiming conflicting rights under a State law. Viewing the case in this light, and so it seems to have been viewed by the learned Judge, who first heard the cause—the suit must, I think, be regarded as prematurely brought. Viewed in this light, this is a Bill in Equity, not resting on a charge of public nuisance, which threatens to work a private and irreparable injury to the complainants' property, or interests, but resting on a claim of personal right in which the complainants seek to be quieted by an injunction. I suppose it cannot be doubted that this is a branch of Chancery jurisdiction never exercised except where the right at law is first clearly established. The right is never tried on

a Bill in Equity; the right must be settled and undisputed, before a Bill to quiet the right can be entertained.

But in the view of the case now taken, the suit is prematurely brought, not only because the right at law is not settled and undisputed, and therefore cannot be quieted by injunction, but also because, if the Court was disposed to try the right on this Bill in Equity, the question of a conflict of laws, on which the right claimed by the complainants must turn whenever the right is tried, has not arisen, or is not presented in a way to enable the Court to take notice of it.

The Act of the Legislature authorising the bridge, remains without execution, and therefore no actual conflict has arisen or manifested itself, or could do so, between this Legislative Act, and the Act of Congress relied on by the complainants as their warrant of title to the free navigation of the Hudson River.

There can be no question here of repugnance in the Legislative Act, arising on its face, and in its terms, and manifest intent, to any special provision in the Constitution of the United States. We know there are cases in which such repugnance would appear on the face of a State law; as if a State should, without the consent of Congress, lay duties on imports, or a duty of tonnage, in manifest violation of express prohibitions in the Constitution. So a State might pass an Act, which should be, on the face of it, so manifestly designed to be a regulation of commerce in some particular, wherein Congress had already fully legislated, under its power "to regulate commerce" (understood now on all hands to be an exclusive power) that such Legislative Act would be repugnant to the Constitution, because in conflict with the Act of Congress, by its very terms. Such precisely was the conflict of Congressional and State Legislation in the great case of *Gibbons vs Ogden*, [9 Wheaton, R., 240.] The Act of Congress gave authority to all vessels of a certain character, and having

a license under that Act, to pass freely, over all the open, navigable waters of the United States, including those of the Bay of New York, and the Hudson River. The Act of the State purported to give authority to a certain class of these same vessels, to navigate the open waters of New York, on having a license under that Act, and forbade all vessels of that particular class to enter upon, or use those waters, without such State authority, under heavy penalties. Nothing could be more palpable than the conflict of laws in this instance, on the face of the Acts themselves.

In all such instances as those now referred to, in a proper judicial case, the Court would have no difficulty in discovering and pronouncing on the repugnancy of the State law to the Constitution, or its conflict with a law of Congress, from the character of the State law. No judicial case *at law*, however, could arise even here, without some act done under the State law to make the occasion or the foundation of a suit. And if a Bill to quiet a right as against such a legislative Act could be maintained at all, it would be on the ground that the right was clear and undisputed by reason of the character of the legislative enactment.

There is, however, a manifest distinction between such cases as I have just referred to, and one where the State legislation complained of has been enacted under an original, undoubted, sovereign power remaining in the State, subject though the power may be, to be restricted and limited by Congressional legislation under another and a different power, and where the Act of State legislation is not, on the face of it, in its terms, or in its plain intent and meaning, or by neccessity if carried into execution, repugnant to any provision of the Constitution, or in conflict with any law of Congress.

In such a case it is clear that no action *at law* could be brought by any party in a Court of the United States, so long as no act or proceeding in execution of the State law, or under color of its authority, has taken place to interfere

with, or in any manner disturb, the perfect enjoyment of all rights claimed and exercised under the authority of any Act of Congress. No foundation could be laid for an action at law. No party could, in an action at law, arraign a naked Act of State legislation before this Court, and ask for its condemnation. He must come here complaining of some wrong, or some loss or damage, for which he holds his adversary responsible.

Take the case before the Court. It is clear that these complainants cannot maintain an action at law in this Court against the Albany Bridge Company. They claim the right of freely navigating the Hudson River at and above Albany, under the authority of an act of Congress, and a license to that effect. But so long as nobody disturbs them in that right, they have no injury or damage to complain of.

No judicial case, then, could be made to give the courts of the United States jurisdiction *at law*, where the question is one of repugnance or conflict, so long as no act or proceeding has taken place under the State legislation resulting in an actual collision of rights and interests. And therefore it is evident that if the Court can entertain a case on a Bill in Equity, where the question is one of repugnance or conflict, before any collision of rights or interests has taken place, then its jurisdiction in Equity stands wholly separated, and apart, from its jurisdiction at law, to this extent; its jurisdiction in Equity precedes its jurisdiction at law in the same identical case, and is exercised when no jurisdiction at law in the same case can be exercised.

The doubt here raised is not to be determined by what may take place in the State Courts under apparently analagous circumstances. The State Courts have general jurisdiction; the Courts of the United States have such special jurisdiction as is given them by the Constitution, and the legislation of Congress. The equity powers of a State Court are a part of its general jurisdiction; the equity powers of the Courts of the United States are a part of its

special jurisdiction. In a State, where a party cannot bring a suit at law because he has not yet suffered an actual wrong or injury, but is only threatened with mischief, and therefore brings his suit in Equity, it is entertained, if at all, merely on some rule of Chancery practice. The general jurisdiction of the Court covers the whole case, and if the party cannot be heard on the law side, he may on the Equity side of the Court. But a Court of the United States stands in a very different relation to the same subject. It has a special jurisdiction in cases in law and equity, arising under the Constitution and laws of Congress. A case must arise, before jurisdiction attaches; and, on a question of repugnance or conflict, no case can arise until an actual collision of rights or interests has taken place; and until a case thus arises, the Court has no jurisdiction in law or equity. It is not two jurisdictions over the same question which is given to the Court, but one jurisdiction, to be exercised when a case arises, and the jurisdiction attaches, on the law side, or the equity side, of the Court according to circumstances.

The position which I maintain is, that no question of repugnance or conflict, not apparent on the face of a State law, can properly come before a Court of the United States in a suit originally brought there, until the repugnance or conflict has shown itself in an actual collision of rights or interests. It is doubtful, perhaps, whether the mere passing of an act by a State legislature which the Constitution expressly forbids it to pass, or the mere passing of an act on a subject—the regulation of commerce for example—on which Congress has already legislated, under a power conceded to be exclusive, is sufficient to authorize a Court of the United States to interpose to arrest that Act by a judicial negative, or veto. At least it would seem to be clear that the mere passing of a legislative Act cannot justify such an interposition, when such Act has been passed by a State, under an independent and conceded

power, which makes provision for a measure of State policy entirely within its acknowledged competency to provide for; which is not on the face of it, or by its terms or intent, repugnant to, or in conflict with, the Constitution or any law of Congress; which must of necessity be a valid Act of legislation both in its inception and maturity, and in its operation, so long as it does not in fact, and by actual collision, conflict, or in any manner interfere with, the fair enjoyment of any rights, property or interests secured by a paramount act of Congress. The case here supposed is precisely the one now before the court. Let us see exactly what this case is, and how it illustrates the question of jurisdiction here presented.

The Act of the Legislature of New York which this Court is called upon to arrest, and forbid being carried into effect, is an Act for establishing, or authorizing, a bridge over the Hudson at Albany. I do not understand that the power of the State to establish a bridge at this point, possessing as it does both banks of the river, and the whole river in its whole extent, is denied or questioned in any quarter. The utmost that is said in derogation of the power is, that it is subject to the power of Congress "to regulate commerce." What that amounts to we shall see.

In the language of Mr. Chief Justice Marshall in *Gibbons vs. Ogden*, this Legislative act "formed a portion of that immense mass of legislation which embraces every thing within the territory of a State not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect *turnpike roads, ferries, &c.*, are component parts of this mass."

The power to establish this bridge stands on precisely the same ground as the power to make roads, canals and railways on the land. It is impossible to distinguish between

2857

the two cases. If the bridge is subject to the power of Congress over commerce, because it spans a navigable water, so are the highways of commerce on the land, subject to the same power, wherever such highways are, or may be made, routes and channels of foreign or inter-State commerce—a position which I shall have occasion to dwell upon more emphatically for another purpose, in a subsequent part of this argument.

Indeed, the power in these cases is one power, and not two powers. The power to make a road in or through a State, includes the power to make that road continuous by a ferry or a bridge, over a navigable stream. A ferry-boat is a moveable bridge; a bridge is a roadway over a river. Every ferry over a navigable water is an impediment or hindrance to some extent, sometimes to a very great extent, to the use of the highway of the river in the direction of the stream. In some cases, this impediment is vastly greater than a bridge produces, provided with a suitable draw. A bridge is a substitute for a ferry, and whenever a bridge can be conveniently established, with suitable provision for the fair accommodation and use of whatever passes up and down on the highway of the river, such bridge is demanded as a better and more perfect roadway than the ferry. There is hardly one mark of the advancing civilization of the age in which we live, greater or more striking than the vast increase of bridges, and the progressive skill and genius employed in their construction, all over the world. It has been a subject of rival claims to superior civilization and advancement between England and France—the number, magnificence and superiority of the bridges in these countries respectively. What would Paris be without the bridges over the Seine? What would London be without the bridges over the Thames? And these are navigable streams. The Thames is navigable for barges thirty-seven miles above London. Twenty-five years ago, more than three thousand lighters, barges and punts were in use

above the lowest London bridge. More steamers bow the heads of their chimneys to the various bridges over the Thames at London, in passing under them, probably in one hour, than would have occasion to pass our bridge at Albany in a week. In the early part of this century, in England, a Parliamentary commission was raised, consisting of twelve members, including the then Speaker, and the Chancellor of the Exchequer, with Thomas Telford, the great architect of the period, as the engineer of the commission, to promote bridge building, especially in the northern district of Scotland, where this civilizing process was more especially needed. In 1812, under the auspices of this commission, 1486 bridges had been constructed, many of them large erections, and some of great magnitude. There is hardly one of the great rivers in the more advanced countries of Western Europe that is without its bridge or bridges, though these rivers almost invariably traverse, or separate, two or more States. A bridge is built, by any sovereign, over any river, on that part of it within his own territory and jurisdiction, he taking care to provide due and fair accommodation for the passing of the bridge by all commerce and navigation in which his own people, or other States, are interested. The government of Prussia has just completed a new and magnificent stone bridge over the Rhine, at Cologne, in place of the bridge of boats which for so many years has occupied that position. This can only be passed by a draw.

In the provision, by a ferry or a bridge, for the crossing of a navigable river, two highways meet and cross each other, just as two highways on the land, running at right angles to each other, meet and cross one another. Two objects meeting at the crossing, cannot occupy the same space on the same, or nearly the same, plane or level. They must accommodate each other, and, if necessary, the police power of the State must step in to regulate the matter.

In all this there is no distinction to be made between the water and the land.

It would be to insist on comparative barbarism, on returning to a state of comparative primitiveness in science, arts and general civilization, to insist, at this day, on the antique and obsolete notion of the superior and monopolizing rights of navigation on navigable streams, as against all rights, or any but the most restricted and meagre rights, of traverse across such streams. The modern railroad, the greatest of all advances made in modern times in physical improvement, giving to commerce and locomotion on the land a facility, rapidity and precision which even steam cannot rival on the water—this must forever put an end to the idea, once perhaps prevalent, that navigation on rivers is entitled to anything more than equal rights, equal privileges, equal facilities, equal protection, with the commerce and travel which follow their great and crowded routes across these rivers.

I venture to state, without fear of contradiction, that, in the very instance before the Court, taking the evidence in the case in spite of all its contradictions and exaggerations, that more tons of freight alone—a great many more—now cross the river at Albany, yearly, in connection with the railroads (and with a bridge the amount will be greatly increased,) than will have occasion to use the draw for passing the bridge up and down the river. Canal boats and barges will pass under the bridge, and so will the whole class of small steam-tugs, with or without a joint in their smoke pipes, without inconvenience. This will leave but comparatively a small part of the navigation employed at or above Albany, to pass the bridge by means of the draw. What in the world is there in sense or reason, what is there that would not be shocking and shameful to sense and reason, to hinder the State and public authorities from according to the vast amount of commerce that traverses the river, even if not half as large as it is, equal pro-

tection and equal facilities with that which moves on the river in the direction of the stream? And if some of the commerce in these two branches must submit to partial inconveniences, what is there in sense or reason, to justify the laying of the whole burthen on that which traverses the river, and none at all on that which employs navigation in the direction of the stream?

And, then, for the persons who are to be accommodated in traversing, and those in passing up and down the river at this point. The comparison is, of three to four thousand daily of those who cross the river at this point, to less than 150 who pass up and down. Can anybody suggest a reason why the government should not take care of the rights and interests of the three or four thousand, as well as of the 150—of the million and more of passengers yearly in one direction, as well as of the 35,000 in the other direction?—especially while in one case the travel, with all the vast business and social interests connected with it, flows on steadily from years' end to years' end, and in the other it is periodical, and is wholly suspended for three or more months in the year.

If the power to make roads, canals and railways is a conceded and indispensable power belonging to the State, which it would be a shameful dereliction of governmental duty not to exercise, to the extent of its ability, it must be equally a conceded and indispensable power belonging to it, to establish bridges over the navigable waters within its territorial sovereignty and jurisdiction, wherever they are practicable, and the public interest demands them, and which it would equally be a shameful dereliction of duty not to exercise. I know of no distinction that can be made between the waters within the territorial limits of the State, and the land, in regard to soveregnty and jurisdiction in the State Government. There can be no greater error, in my judgment, than to suppose that the Constitution of the United States, by any of its provisions, or by any inference

to be drawn from the character, necessities or objects of the government established by it, takes from the State its general sovereignty and jurisdiction over its navigable waters, any more, or in any greater degree, than it takes from it its general sovereignty and jurisdiction on the land. The State is sovereign over the waters in the same sense, and in the same degree, that it is on the land. As sovereign, it commands in all public places, as on highways and rivers. A river is a highway devoted to the use of the public, just in the same sense in which a road is a highway devoted to the use of the public. That grand and comprehensive provision of the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," which so beautifully constitutes the people of the United States one people, without trenching on the separate communities into which they are divided, or the general sovereignty of the governments of those communities, undoubtedly enlarges that public to whose use the navigable waters of the several States are devoted, from the public of the State to the public of the United States. And in exactly the same manner, and in the same degree, are the highways of a State devoted to the use of the whole people of the United States, instead of being limited to the people of the State. No State can impose any restrictions, terms or conditions, on citizens of other States, in the use of its highways, whether of water or on land, than such as it imposes on its own citizens. And it can give its own citizens no privileges, immunities or advantages in the use of these highways, that do not at once, and equally, belong to the citizens of all the States. But the State, as sovereign, does not the less command in these public places, as it does elsewhere, within its territorial limits.

The boundaries of the State of New York include all the waters of the great Bay of New York as far as Sandy Hook, or to the open sea, and the waters of the Sound to the eastern line of the State across that arm of the sea; and

of course they include all its interior waters. Within all these boundaries, water and land included, the State is everywhere Sovereign. It is sovereign in the same sense in which it was sovereign before the Constitution, notwithstanding the surrender of certain specified powers which it cannot now exercise at all, and notwithstanding the fact that among its general powers not surrendered, there are some of which the exercise is subject to restriction and limitation by the exercise of some power on the part of the general government which has been surrendered. The State has not lost its general sovereignty and jurisdiction because it has surrendered its independent power to lay duties on imports and exports, and to lay duties of tonnage; nor because its power to legislate in respect to its public highways, whether of water or on land, may be subject, in a certain degree, to the paramount power of Congress "to regulate commerce;" nor because the judiciary of the United States is clothed exclusively with the admiralty and maritime jurisdiction of the country. In this latter particular, this Court has said that this power does not carry a cession of the water where these cases may arise, or the general jurisdiction over them. This adheres to the territory, and to the government to which the territory belongs. (U. S. vs. Bevans, 3 Wheat. R. 316.)

The State owns the soil under all the navigable waters within its boundaries—taking the term "navigable" in its common law meaning, as applied to waters where the tide flows and ebbs. The State owns the soil under the navigable waters of the Bay of New York, and of the Hudson, and it grants the soil at its pleasure. (Commissioners of Canal Fund vs. Kempshall; 26 Wendell's R. p. 414; Verplank's opinion.) The Commissioners of the Land Office have power to grant these lands, and have frequently exercised that power. The State has granted the land under water around the city of New York, to that city, for the purpose of constructing piers, wharves and docks for the

uses of commerce, at that great centre of trade and navigation. At other points and places on the Hudson, the State has made similar grants for similar uses. The State itself constructed the great pier and basin at Albany, in connection with its canals, and has granted land under the water on the opposite side of the river at this place, for piers and wharves. And wherever such grants have been made, encroachments have necessarily been made to some extent, on the bed and highway, and public easement, of these navigable waters. And nobody that I have heard of, has thought of questioning the sovereignty and jurisdiction of the State in this matter, or its right to grant the land, and to authorize these encroachments on the free flow and navigation of the river. The general goverment itself has received frequent cessions from the State, by formal transactions, both of the soil under these same waters, and of the general jurisdiction (with some special reserves) over the sites thus ceded. It has received these cessions in the Bay of New York, and at various points in the Hudson River, for light houses, and other erections, necessary for national uses.

Some years ago the State authorised a bridge over the Hudson at Troy. This was opposed by those interested in the navigation above Troy, where the tide flows, but after a trial in the State Court, and a decision, accompanied by a very learned and able opinion, in favor of the right, the opposition was abandoned, and there the bridge now stands, with only a very narrow and inconvenient draw, for the accommodation of the navigation above it. Many years ago the State, in connection with its canals, constructed a dam across the river at a point below the flow of the tide, with a lock through which all navigation above has to pass.

In virtue of the same sovereignty and jurisdiction, which the State has been exercising ever since the Union was formed, it has now undertaken to establish a bridge at

Albany. This is opposed, almost of course, by those who are interested in the navigation above this point, and by the parties most interested in maintaining the bridge at Troy.

I do not understand, however, that the general sovereignty and jurisdiction of the State, over the waters of the river are denied, or the general right to make or authorise erections therein, provided the freedom of navigation be preserved. What is insisted on, is, that the right to establish a bridge is subject to the power of Congress to regulate commerce; that Congress has legislated under this power in the Act for granting licenses for the coasting trade; that the complainants, and others, are engaged in navigating the river under the authority of such licenses; that these licenses secure to them the right to the free and unobstructed navigation of the river, at and above Albany; and that in their opinion, and in the opinion of *their* witnesses, the bridge, if built, will not leave to them, what they consider a free and unobstructed navigation.

The bridge, it must be remembered, has not been erected; it was not erected, or begun, when this suit was brought, and it has not yet been erected, or begun, because two years and a half ago, the judicial power of the United States, was successfully invoked to lay the State, or its agents, under interdict against the erection. The State, by the very terms and conditions of its enactment, had made the most careful and anxious provisions for preserving and maintaining "the free navigation" of the river—a matter in which the State had quite as deep a stake as any body else, in or out of the State, could have. The free navigation was to be preserved, first by the elevation of the bridge "so as to allow under it the free passage of canal boats, and barges without masts," in which, in truth, the great bulk of the commerce above Albany is borne; and next, by a draw, or draws, "of sufficient width to admit the free passage of the largest vessels navigating the river."

The Act, with its supplement, fixes the minimum width of the draw, or draws, which must therefore be of the most ample width, and such as could only be constructed by the advance and triumphs of modern science and skill. Other provisions are made for rendering voluntary aid, without cost, by means of steam tugs, to facilitate vessels in passing the draws of the bridge; and other provisions still, for the prompt application of remedial measures for keeping the bed and channel of the river free, if by possible chance, the piers of the bridge should be found to cause any obstruction in them. Finally, the Act provides, under severe penalties for any neglect, for the prompt and efficient management of the bridge, and of the draw or draws, to accommodate and facilitate vessels in a safe and easy passage through the bridge, at all times of the day and night.

Now it is in the face of all these careful provisions, embodied in the Act itself, for preserving the free navigation of the river, before the erection of the bridge is begun, and before the right or interest of any human being, as claimed under an act of Congress, has been in any manner encroached upon or disturbed, that a question of repugnance to the Constitution, or of conflict with such act of Congress, in the law of the State authorizing the bridge, has been raised, which the Courts of the United States have been asked to entertain, and, upon the anticipation of events that no mortal man can say will ever happen, and, on testimony, of necessity and in the nature of the subject, amounting to nothing but a purely speculative prognostication of evil, to forbid the law of the State being carried into effect.

Now, what I insist upon is, that no question of repugnance or conflict has arisen in this case of which the Court can take cognizance; that no judicial case can arise, where the question is one of repugnance or conflict, not apparent on the face of the legislative Act, until an actual collision

of rights or interests takes place in the working or operation of the law against which repugnance or conflict is alleged; that no judicial case can arise, in law or equity, on an allegation of repugnance or conflict, upon a naked or unexecuted law of a State; that if it can arise where the repugnance or conflict is palpable on the face of the law, it cannot arise, on such an allegation, upon a naked or unexecuted law of a State, where that law, on its face, and in its terms, and plain intent and meaning, is confessedly not repugnant to the Constitution, or in conflict with any act of Congress; and that the Court cannot create a judicial case for itself, nor can parties create a judicial case for it, when the case is such as I have described, by means of allegations, and volumes of proofs, offered and received, to show that it is intended to carry the law into effect, and that, if carried into effect, apprehensions and opinions are entertained that certain rights or interests claimed under an Act of Congress, will or may be impaired or disturbed, and thus a conflict between the law of the State and such Act of Congress would or might be established. I hold that the Court cannot anticipate a conflict of laws in any case; that there is no conflict of laws in a case like this before the Court, of which the Court can take cognizance, until an actual collision of rights and interests takes place to show the conflict, and to lay the ground for a judicial case; that the Court must wait until the rights or interests of some party, claiming under the authority of the United States, have been impaired or disturbed by some party acting under the State law, or is alleged to have been so, before it can entertain so grave a question as that of conflict between the two laws, and the two governments enacting them respectively, and where the result may be the condemnation of the law of the State, upon mere speculation as to its operation, and the arrest of the government of the State, in a measure which may be of vital importance to the

interests and prosperity of the people over which its sovereignty is exercised.

If a naked, and as yet unexecuted, State law can be brought under the revision of the National Judiciary, in the form of a proceeding in Equity, and there forbidden to be carried into effect, not from what may appear on the face of the law, but from testimony received to show what will be its probable, or possible, operation if not thus forbidden, then I think no one can fail to see that the Judiciary, in all such cases, performs an office quite foreign to its character as a Judiciary—an anomalous office, partly executive and partly legislative, and such as we must all be quite sure was never intended to be created, or bestowed, on any branch of the National Government.

The subject of vesting just such an authority in Congress, or in some other hands to be devised for the purpose, was proposed, and very earnestly debated, in the Convention which framed the Constitution of the United States. There was hardly any other single topic which was longer under debate, or more deliberately considered. Congress was the body in whose hands it was generally thought best to lodge the power of revision and veto, over State legislation ; though suggestions were made of a Commissioner for this purpose to reside in each State, or to make the Governors of the States appointees of the General Government, and clothe them with the power of revision and an absolute veto. Many of the leading men in the Convention advocated such a power, Mr. Madison, perhaps, more persistently than anybody else. The main object was the exercise of the very identical power we are now considering—that of revising and arresting, by an absolute negative, all State laws which might be deemed to be repugnant to the Constitution, or in conflict, or likely to come into conflict, with any law of Congress. Of course, the question of repugnance or conflict was to arise on the naked law, before it should be carried into effect, and was to be determined

upon the character and provisions of the law itself, or upon such an inquest, and such investigations into the probable, or possible, operation of the law, if allowed to be carried into effect, as should satisfy the revising authority. It was not until a late period in the session of the Constitutional Convention that this project was abandoned. It was not abandoned until its advocates became satisfied that the States would indignantly reject any Constitution containing such a provision—one which would have effectually stripped them of all proper sovereignty, and left them with no more authority or dignity than a Board of Supervisors in a county. Fortunately, when the powers to be given to the Judiciary of the United States, came at last to be adjusted and settled, and the language carefully selected and fixed by which those powers were created and conferred; when it was seen that its authority extended to all judicial cases arising under the Constitution, laws and treaties of the United States, and when, finally, the important and vital principle and provision was added that the Constitution, laws and treaties of the United States should be the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding;" when all this was done, all parties became satisfied that a much better, wiser and safer adjustment had been made of the difficult and delicate problem of securing harmony between the State Governments and their laws, and the Constitution and laws of the United States, than could have been done by any direct power of revision and negative over State legislation. (Vide Curtis Hist. of Constitution, vol 2, pp. 430, 437, 438, 439 and 440; 5 Elliot's Debates, pp. 170–4, 209, 210, 251, 321, 468, 469, 539, and Index, tit. "Acts," p. 604)

It will not do to say that this power of revision and negative was merely shifted from Congress, where it was first proposed to lodge it, to the Judiciary. No such power was conferred by the Constitution, and if it had been, and had

been so understood, that instrument would certainly have been rejected by the States. The power in the hands of the Judiciary would certainly not have been deemed less exceptionable than in the hands of Congress. Where inquisition and investigations are to be made, and volumes of testimony taken and weighed, on subjects so peculiarly of parliamentary or legislative cognizance, as in the very case now under review in this Court, before a question of repugnance or conflict alleged against a State law can be decided; certainly no one can say that such a case is not fitter for a parliamentary committee than for the Judiciary. Must not every one say that it is fit only for such a committee, and for legislative action and determination, and not at all for a judicial body? Certainly, every one must see that the true way and the only way—a method perfectly effectual too for all practical purposes—of dealing with this subject of State legislation, to keep it in practical harmony with the Constitution and laws of the United States, and at the same time relieve the necessary interference with it, in cases of alleged repugnance or conflict, of all that is most offensive to the dignity and sovereignty of the State, was the very course adopted by the Constitution. By this means, all State legislation, passed under admitted powers, stands as valid law, on the authority of the sovereignty which enacts it, until a conflict declares itself by some actual collision of rights and interests between parties, claiming respectively under State legislation and under the Constitution or legislation of Congress, and then the Judiciary is invoked to settle the question on a judicial case, and in a strictly judicial way. (2 Curtis Hist. of Const., p. 54.)

It adds, I think, force to the view I have ventured to present on this subject, that previous to the Albany Bridge Case, no occasion had ever been found on which it was thought proper to employ a Preliminary Injunction to arrest a State law, as yet but a naked and unexecuted enactment, and a valid law on the face of it, on an allegation of repug-

nance or conflict. And if the Injunction should be made perpetual, it would be the first example and instance of such a conclusion being reached, in any similar case. If I am mistaken in this, the Court will know. I have not found or heard of such a case.

In the leading case of Gibbons vs. Ogden the collision of rights and interests was actual and flagrant when the injuction was asked for and granted in the State Court, and of course when the case came before this Court on appeal.

In the Blackbird Creek case, (8 Curtis, 105,) a dam had been constructed across the creek, and a collision in respect to rights and interests had occurred.

Applications for Injunctions to prevent the erection of bridges over navigable waters have been asked for in several instances, and the Courts have entertained the cases—the question of jurisdiction not having been raised. It seems to have been assumed that the Court had the power to grant the Injunction, if a case for it was made out; but no such Injunction has been granted, I think, in any case. Yet the distinction does not seem to have been adverted to, between the act of a mere trespasser in placing obstructions in a public river, complained of in an English Court of Chancery as threatening injury to an unquestioned private right, and erections authorized by State legislation, which, on its face, contemplates no unlawful obstruction, and which, as I hold, cannot be complained of in this Court, by a private party claiming under a law of Congress, so long as his right, whatever it be, remains actually undisturbed.

In the Cuyahoga River Bridge case, before Mr. Justice McLean, (3 McLean R. 226) the complainant relied on the ordinance of 1787, for his claim to the free navigation of this river, which he insisted would be obstructed by a draw bridge. The application was denied.

In the Rock Island Bridge case, before the same judge, (4 McLean's R. 517) the application for an injunction was denied. There the United States was a party, and com-

plained not only of prospective injury to the navigation, if the bridge should be erected—a ground of claim in the case which the Court declared the United States as a private party could not set up—but complained also of special injury, already done by excavations and otherwise, to Rock Island, of which the United States was proprietor. The case turned on this latter complaint.

In the cases arising in New Jersey before Mr. Justice Grier, (vol., Alb. Bridge case, 74) the application for injunctions was denied. In these cases there was a complaint of the proposed erections as public nuisances, and they appear to have been considered in that view.

In the Wheeling Bridge case, (19 Curtis R. 621) the application for an injunction to prevent the bridge being built, was in behalf of Pennsylvania, and was put expressly on the ground of nuisance. Before the case came to a hearing the bridge had been completed, and a supplemental Bill set forth that fact, and complained of the bridge, not as a prospective, but as an actual nuisance, doing special damage to the complainant. On this ground the case appears to have been heard and decided.

In the case now before the Court, on the hearing for a Preliminary Injunction, Mr. Justice Nelson appears to have considered the case as analagous to cases in the English Court of Chancery, where the title of the complainant was clear, but the obstructions denied, and where the question of obstruction or not, was the only one to be tried. These were cases of unauthorized obstructions by individual enterprise. And even there, Chancery would not try the question of obstruction, which here the Circuit Court proposed to do, and thereupon issued the Injunction till the further hearing on that point in Equity.

The Court regarded the Complainants as having an unquestioned "legal right to a free and unobstructed navigation of the Hudson River, secured by the Constitution and Acts of Congress;" and stated that the right was understood not to be denied on the argument.

The mistake in this statement, I suppose, consists in inadvertently stating the "legal right" supposed to be conceded, altogether too broadly. The right to navigate the river was admitted, but the right to build the bridge, just as authorized by legislative enactment, was insisted on at the same time, and any right of navigation which could not be enjoyed with such a bridge, was not admitted, but denied. The legal right of the complainant "to a free and unobstructed navigation," in the broad sense of these terms, was not therefore clear, and was not unquestioned. There was an admitted right of navigation, but not in exclusion of the bridge, and just such a bridge as the State law contemplated. The bridge as contemplated, would leave all the navigation the complainant was entitled to, and any larger right of navigation than this was denied. This was the defendant's position.

Here were opposing claims of right under the legislation of different governments. The laws in both cases were passed by perfectly competent authority; and no supremacy could be asserted for the law, under which the complainants claimed, over the law under which the defendant claimed, until the right of the complainants, whatever it might be, was encroached upon by the measure adopted under the State law. The laws themselves did not conflict; and no case, as I suppose, could be made for the Court until an actual collision of rights, or what might be claimed to be such, should take place. Then an action at law would decide between the opposing claims.

But all this was anticipated by the Court. On a Bill in Equity, a broad, and disputed right of navigation, but still undefined, was held to belong to the complainants. And, thereupon, though the State law contemplated no obstruction to any reasonable right of navigation, testimony was received on the one side and the other, on which the Court might try the question, whether, or not, an unlawful obstruction to the vague right of navigation as held by the

Court to belong to the complainants, might not be created if the bridge should be constructed.

We hold that the Court, on this Bill in Equity, if considered merely as a Bill to quiet a right by injunction, erred in entertaining either the question of right, or the question of obstruction.

IV.

But I suppose it is not to be doubted that all these cases where suits are brought in Equity to protect the rights and interests of the complainants in the navigation of public rivers against bridges, and the like erections, if they can be maintained at all, must stand on the charge of public nuisance against the alleged obstructions, and cannot rest on any other ground of Chancery jurisdiction. It is not an isolated private right which is set up in these cases. It is a right enjoyed in common with the public, or at least such portion of the public as have a common authority from the Government of the United States. What is complained of, along with the injury to a personal right, is an unlawful obstruction of a public navigable river, or common highway. This is a public nuisance, according to the doctrine of the common law.

The complainants in the case before the Court, have not neglected in their Bills to declare that the bridge, if erected, will be a common nuisance. In my further consideration of this case, I shall treat it as standing on this ground.

The first question to be considered, is, whether the Court has jurisdiction and authority to declare an obstruction to navigation, actual or threatened, in a public river, placed there without the authority of the United States, to be a public nuisance.

I have referred already to several cases in which the Court seemed to take this jurisdiction for granted. The question of jurisdiction does not appear to have been raised.

In the Wheeling Bridge case, it is not to be denied that a majority of the Court held the bridge, as erected, to be a public nuisance, because in their judgment it obstructed the accustomed use of the River Ohio, to a certain class of vessels, navigating that river; and the right of the Court to entertain the case on a Bill in Equity, as a question of nuisance was elaborately maintained. Two members of the Court, however, dissented from this opinion, the Chief Justice being one of them, who utterly denied the jurisdiction.

As this was the first case, and is thus far I believe the only one, in which this question of jurisdiction was considered, I hope it may not be thought going too far, to ask that the question should not be deemed settled past all propriety of reconsidering it. Perhaps that case might be advantageously reconsidered, in more aspects than one. The decision was by a divided Court. The decree in the case, was never carried into effect, because Congress interposed by a special Act of Legislation, under its power to establish post-roads, to affirm the State Legislation in the premises, as not illegal, and not creating a nuisance, and to adopt the bridge, just as it was built, as a post-road. And I suppose all parties and persons, are now satisfied that it would have been a great misfortune, and a great calamity, not to Virginia only, but to the whole country, if the erection of that bridge had been prevented, or if being erected, it had been abated by the Court, as a nuisance. The case, therefore, as a whole, is hardly one to be followed as a precedent.

The majority of the Court put the right of the complainant, the State of Pennsylvania, to complain of the bridge, on the ground of private injury from a public

2899

nuisance. She did not sue in her capacity of a sovereign State. She was before the Court in the position and light of any natural person, or ordinary corporation. She was not engaged in navigating the river under a license from the United States, and therefore could not complain that her rights of navigation under a law of Congress, were interfered with. But the right of all the people of the United States to the free navigation of the river was insisted on, as having been somehow or other secured by the legislation of Congress. Regulations of commerce by Congress, under which licenses for the coasting trade had been granted, and ports of entry established on the river, were referred to; and so was the compact between Virginia and Kentucky in relation to the free navigation of the Ohio, and the sanction of that compact by Congress. This compact seems to have been mainly relied on as establishing the general right of free navigation under the authority of Congress. But the complainant, as a legal person or corporation, who was not engaged in the navigation of the river in any way, and who had therefore no violated rights in that particular to complain of, could not make a judicial case for itself in this Court on that ground. If the legislation of Congress secured the free navigation of the river to all who chose to navigate it, and if the legislation of Virginia authorizing the bridge, was in conflict with that right, still the complainant was not engaged in the navigation, and no individual rights of hers in that respect had been disturbed by the bridge. And since she could not claim the protection of the Court against the legislation of Virginia as being herself engaged in navigating the river, under the authority of Congress, she was in no condition to invoke that protection for others who were thus engaged. It was not, then, her individual right of navigation which was complained of as interfered with by an obstruction constituting a public nuisance. She set up certain losses and damage to her interests in works of internal improve-

ment of which she was proprietor, as flowing directly from the obstruction, and on this ground of private injury from the obstruction, which she charged as a nuisance, her case rested.

The jurisdiction of the Court in this view of the case was, as I have said, elaborately maintained. It seems to have been put mainly on the ground that this Court had adopted the practice of the high Court of Chancery in England, where jurisdiction in analagous cases was entertained. But the question of jurisdiction in this Court was entirely distinct from any mere question of chancery practice. The question whether, on a Bill in Equity, this Court will proceed according to the practice of State Courts, or according to the practice of the Court of Chancery in England, does not seem to me to meet the question of jurisdiction. The Court say, "the usages of the high Court of Chancery, *whenever the jurisdiction is exercised*, govern the proceedings." But this does not go one step towards deciding whether the jurisdiction in this case can be exercised by this Court, according to law. If it cannot, no usages or practice of any Court can be applied to it.

The jurisdiction of the Courts of the United States is special and not general, and is just what the Constitution and laws of Congress confer on them, and this is as true of their jurisdiction in equity as in law. In Wheaton and Donaldson vs. Peters, (8 Peters, 658,) the Court said: "It is clear there can be no common law of the United States. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the State in which the controversy originated."

This Court must have some law to give it jurisdiction. It has no general common law jurisdiction. Its authority to pronounce the bridge a nuisance must rest on the legislation

2401

of Congress; either on such legislation directly applied to the subject, or on the Act of Congress which makes the laws of the State where the controversy originated, the rule of decision in a Court of the United States. If there had been any legislation of Congress which made this bridge, as partially obstructing the free navigation of the Ohio, a public nuisance, or if the common law of Virginia as modified by the Statute authorizing the bridge, made the bridge a public nuisance, then the Court had jurisdiction so to pronounce; otherwise it had no jurisdiction.

It cannot be pretended that the bridge was a nuisance by the laws of Virginia. No State Court of Virginia could have so pronounced. No Court of the United States, sitting in that State, could have so pronounced. A Statute of the State had authorized the bridge, and that was the end of the law in that State, so far as the allegation of public nuisance was concerned.

Upon what legislation of Congress, then, applicable directly to the subject, could the complainant rely to maintain the jurisdiction of the Court.

It is not pretended that there was any enactment of Congress, in terms, declaring obstructions, partial or otherwise, in navigable rivers generally, or in the Ohio in particular, whether by bridges, or other erections, public nuisances. There was no direct Legislation of Congress, on the subject of bridges over navigable waters; none defining what erections should constitute, or be deemed, obstructions, and what should not, or what obstructions should be deemed a nuisance, and what should not. And it is difficult to conceive how this Court could have jurisdiction to define and declare what erections in a navigable river, should be deemed obstructions, and public nuisances, and what should not, while it is certain that Congress, from which alone its authority on the subject must be derived, has never Legislated on the subject of obstructions to navigable rivers in any form whatever.

A public nuisance is a public offence, and those who establish or maintain it, are liable to indictment and punishment as public offenders. There can be no public nuisance which is not a public offence. And there can be no better test of the right of jurisdiction in this Court, in a civil case, to declare any act complained of a nuisance, than to enquire if any legislation of Congress, has declared that act to be a public offence. The Court in this case concede that it has no criminal jurisdiction in the matter, because Congress has passed no law, declaring the act of establishing such a bridge a public offence, and prescribing the punishment of it. Certainly, that is an abundantly good reason why the Court cannot exercise criminal jurisdiction in the case; but it is an equally good reason, why a civil suit cannot be maintained for a private injury arising from the act complained of. If there is no legislation of Congress, which makes the erection of a bridge obstructing navigation, a public nuisance and offence, whether provision is made, or not, for its punishment criminally, then certainly no private suit can be maintained for special damage, arising from it, on the ground of its being a public nuisance. It cannot be held to be a public offence, except by the legislation of Congress. There is confesedly no such direct legislation. There is nothing, therefore, to warrant the Court in deeming the bridge to be a public nuisance, or treating it as such.

At common law, the unauthorised obstruction of a navigable river, is a public offence, and punishable by indictment. (4. Bl. com. 167.) But, as we have seen, there can be no common law offence of this kind against the United States. Ten thousand obstructions of navigable rivers in the United States might be made, without one public offence against the United States, until Congress shall declare any such act to be a public offence. Obstructing the mails of the United States, is not a public offence, until Congress so declares it. Counterfeiting the coin of the United States

is not a public offence, till Congress so declares it. Surely the Courts of the United States, have no larger authority over the navigable waters of the United States, within the territorial limits of the several States, than they have over the public mails, and the public coin, in the absence or want of legislation by Congress, to provide for their protection. If Congress has thought, as it might well think, that the States themselves were the best authorities to protect their public waters against unauthorsed obstructions, and that serious obstructions of their own navigable rivers by State authority, was too remote a probability or possibillity, to require any legislation on the part of Congress, certainly, there can be neither any authority, or any occasion, for the Courts of the United States to intervene in the matter.

It seems to me to be sufficient to rest the objections to the jurisdiction entertained by the Court in the Wheeling Bridge case, where I have now placed them. But I shall have occasion to recur to that case in another part of my argument, and to present some further views which cannot fail, I think, to add strength to those already submitted.

It is most apparent to my mind, that the Court in the Wheeling Bridge case, in declaring the bridge over the Ohio to be an unlawful obstruction, and a public nuisance, as against the sovereign rights and authority of the United States—for the decision was exactly that, or it was nothing—declared what Congress had never declared, and had never authorized the Court to declare. I hope I shall be believed when I say, that in submitting my views of that case, I do so without any abatement whatever of the profound respect for this Court which it has been the habit and the pride of my whole life to entertain. I confess, at the same time, to the deepest anxiety, as a matter of the highest importance to great public interests, that that case shall not be deemed by this Court as a settled precedent for the leading doctrines which may be

thought to be embraced in the decision, and certainly not as establishing the jurisdiction and authority of the Court, without some more explicit legislation of Congress on the subject than any we now have, to declare what shall, and what shall not, be deemed obstructions in a public river, and when any such obstruction shall, and when it shall not, be deemed a public nuisance.

To come back now to the case before the Court. I ask the Court to apply to this case, the reasoning I have ventured to employ in reference to the Wheeling Bridge case.

If I do not greatly deceive myself, it is quite clear, that this Court has no authority to decide that a bridge, erected by State authority, over a navigable river within the territorial limits of the State, is an obstruction to the navigation of such a character as to be a public nuisance. It has no such authority, because Congress has not given it any such authority, and it has no common law jurisdiction in such cases, or in any case. Congress has passed no laws to forbid obstructions in public rivers, or to declare any obstruction a public nuisance. I go further than this, and maintain that it has adopted no legislation the object of which has been to control State legislation over the navigable rivers within the limits of a State, in respect to erections, such as piers, wharves and bridges, in or over such rivers, or in respect to any effect which may be produced by such erections upon the freedom of navigation. But I shall have more to say on this last position in another part of this argument.

V.

The Court cannot, of course, interpose to prevent the creation of a public nuisance, at the instance of a private

party, unless that party shows that some special damage or injury will accrue to some personal right, property or interest of his own, from the nuisance. For this reason, and to give the complainants the right to prosecute their complaint in this Court instead of a State Court, they allege that they have a special right to the personal use and enjoyment of the free navigation of the river under a license for the coasting trade, issued to them, respectively, under the authority of an Act of Congress, and that the bridge, if erected, will greatly interfere with, and limit, the use and enjoyment of such licenses. They also insist that the bridge will derange, interrupt and diminish, and do irreparable injury to the trade, commerce and business, connected with the navigation of the river, in which they are personally engaged. And one of them complains that the bridge will greatly and irretrievably impair the value of his real and personal property in Troy.

Having thus, as they suppose, established their personal right to complain of the proposed bridge as a public nuisance, they ask for the interposition of the Court to forbid its erection.

But several things are necessary to be established before the Court can interpose in the way demanded. It must appear:

That the proposed bridge will, if established, be a public nuisance;

That the allegations of special damage or injury to the complainants, as set forth by them, or that some of them, are such as this Court can take cognizance of;

That the right or interest, the injury to which is complained of, is a clear right or interest at law, in the complainants; and,

That that right or interest is of such a nature, and the injury of such a character, and extent or degree, that adequate redress could not be had in an action at law.

I have already shown, or endeavored to show, that the Court cannot take cognizance of any allegations of the complainants, to make them a substantive ground of judicial action, which consist of complaints that the erection of the proposed bridge threatens to impair the value of their real and personal property in Troy, and to injure their general business affairs and interests, carried on at that city, or elsewhere. Much less can the Court take such cognizance of any allegations of the complainants to the effect that the State had entered on a measure of mistaken public policy, which, instead of benefitting, would inflict injury on its own public interests, and on its own people, either generally, or in particular localities.

The general charge in the case is that of public nuisance by obstructing a public river—in other words, a charge that the defendant is about to do an act criminal in its nature, an act which would be an offence against the United States.

None of the allegations of private injury to the complainants, in this case, can be received, as putting them in a position to bring this charge of public nuisance against the proposed bridge, in the form of a Bill for an Injunction, except that which affirms their personal right, under the authority of an act of Congress, to the free navigation of the river. It is the right to the use and enjoyment of the license they set up, and of the free navigation of the river under it, which they insist would be directly interfered with by the proposed bridge, which gives them the right, if any they have, to complain of the bridge as a public nuisance.

It must be remembered that the only public nuisance of which this Court could take cognizance, in any form of action, information or complaint, is, a public nuisance, and a public offence, against the government of the United States. A nuisance and offence against a State govern-

ment is not within its cognizance. The proper mode, undoubtedly, of bringing before this Court a charge of nuisance committed, or threatened, against the United States, would be upon an Information, to which the Attorney General of the United States should be a party. (Opinion of Ch. J. Taney, in the Wheeling Bridge case, 19 Custis, p. 655.) The United States is the principal party in interest in the question of such nuisance, and ought to be heard, by its proper officer, before the question of nuisance, or no nuisance, should be decided. And the only ground on which a Court of Chancery will hear this charge of public nuisance from a private party (if it ought to or will hear it at all) is that of a direct, immediate and irreparable injury, actual or threatened, to the use and enjoyment of some right, property or interest of such party, and for the redress of which an action at law would be inadequate. Allegations of remote, contingent, incidental or speculative interests, will not be listened to. Besides, on a Bill in Equity in a Court of the United States, such private party could only be heard to complain of private injury to the use and enjoyment of some right, property or interest held and enjoyed under the Constitution or Laws of the United States.

In this case, the complainants must stand on the particular right claimed by them to the free navigation of the river, under the authority of their license from the United States, and the allegation that the use and enjoyment of such license and right will be directly interfered with, and injured, by the bridge, and nuisance, if permitted to be established.

On this state of the case, the question presents itself whether the particular private injury here set forth, if any should ever accrue from the erection of the bridge, is not one for which an adequate and complete redress could be had in an action at law. If it could, it is clear

upon the unquestioned doctrine of the law on the subject, that the complainants cannot be heard to bring this charge of nuisance against the bridge on this Bill in Equity for an Injunction. There is, besides, a statute of the United States forbidding the Courts to entertain a case in equity when a plain and adequate remedy in the case may be had at law. (1 Stats. at large, 73.)

Of the adequacy of the remedy at law in this case, there cannot be a doubt. Nobody pretends that the bridge is to shut up the river. The complainants will always be able to take their vessels through the draw. If they experience all the difficulty, delay and danger which their worst apprehensions anticipate, there will still be no difficulty in ascertaining their loss and damage in an action at law. The loss by delays, whether of minutes or days, and the loss from injuries to vessels or cargoes, by collisions with the bridge or otherwise, and any extra expense attending the passage, are all as easily ascertainable in dollars and cents, as damages in a thousand other cases constantly tried in our courts. The losses ascertained on one occasion would be a guide to the amount of the like losses on other occasions. And even the amount of damage sustained by depreciation in the value of the complainant's property, real or personal, in Troy, or by lessening the profits of their general business—if these remote and incidental effects of the bridge, supposing them to occur, could be made the subject of claims for damages at all—could be ascertained without any special difficulty.

The complainants cannot be heard in this case as the representatives of a class—those navigating the river under licenses for the coasting trade, for example; or as the representatives of the navigating interest generally on the Hudson; or as the representatives of Troy, West Troy and Green Island. They cannot be heard to ask

the Court to forbid the erection of the bridge, in the interest of the public, and because it will be a public nuisance. If the Court arrest the erection, it will not be to protect the public, or any portion of the public, from the bridge as a public nuisance. The government which represents the public, and is the guardian of its interests, is not before the Court, and has not complained of the bridge as a nuisance, or asked the Court for its interposition. Until it does so, the Court cannot volunteer to be the guardians of the public interests in this regard. The Court can only consider the question of public nuisance, or not, in the interest of the complainants, and not at all in the interest of the public, and if it puts its interdict on the bridge, it must be for the protection of the complainants, and for them alone. (Opinion of Ch. J. Taney, in Wheeling bridge case, 19 Custis, p. 655.) The question for the Court, in this view, is, whether the extraordinary protection which the complainants demand is indispensible in order to secure them in the enjoyment of rights and interests which, of themselves alone, are of such great magnitude, and such pressing importance, and at the same time are of such a character, that a remedy at law could not reach or cover them with any adequate redress. To propound such a question is to answer it.

The misfortune of this case, brought before the Court on a Bill for an Injunction, is, that if the Court grants the Injunction to protect the complainants, it forecloses the public, and the government of the United States as representing the public, on the question of the charge against the bridge as a public nuisance, without that public being allowed to be heard on that question, as it is entitled to be heard. The fact that the government of the United States, against which this offence of nuisance is committed, if it be a nuisance, has not complained, and

does not complain of it, through its proper officer, should be taken to bear strongly against all present interference with it. The complainants have no right to ask the Court to interpose for their individual protection in a mode which, if their suit is successful, forecloses the public on the main issue in the case, without suit or a hearing on its part, while the law is open to them, by a plain remedy for full redress, whenever they are touched by any actual injury to their personal rights or interests from the establishing of the bridge. If not satisfied with their remedy at law, and if, moreover, they really think the bridge will be a public nuisance, and a public crime, and are really desirous that the public as well as themselves, shall be protected from it, let them apply to the Attorney General of the United States, the proper law officer of the government, to institute and prosecute proceedings in behalf of the the government, against the bridge. Then the issue would be fairly before the court. If the Attorney General can be persuaded that the General Government, by reason of anything in the Constitution, or in any legislation of Congress, commands in the waters of the Hudson, instead of the government of New York, in regard to what may, or may not, be deemed obstructions to the highway of that river, by works of public improvement and public accommodation, constructed under State authority; and if he can be persuaded that the proposed bridge will, if erected, be an unlawful obstruction, and a public nuisance and public crime, it will be his duty to proceed against it. In such a case, the Court would be relieved from all embarrassment, and all undue responsibility. The Wheeling bridge case is an example of the injustice which is done the Court, when it is asked to pronounce a bridge to be a public nuisance at the instance, and in the interest, of a private party, and when the public against which the offence bears, if there be any, is not consulted

or represented before the Court. In that case, the decision of the Court that the bridge must be deemed a public nuisance, was reversed by the very extraordinary mode of a public law, passed for this purpose, by the very government against which the alleged nuisance was supposed to have been committed.

This is not the case of a nuisance, if a nuisance at all, such as a private trespasser may commit by placing unlawful obstructions in the highway of a road or a river. Our bridge is to be erected under color, at least, of sovereign authority, and is not to be treated as a naked trespass, growing into an act of public criminality. A State may err in the exercise of its sovereignty, but it cannot commit a crime or a misdemeanor. This bridge is not a public offence against the State, or the public of the State. It is not a *purpresture* by the laws of the State. A *purpresture* is an unauthorized encroachment on the property or soil of the sovereign, in a highway, river or harbor. (Per Ch. Kent, in Attorney General v. Utica Insurance Company, 2 J. Ch. R., p. 381.) The soil of the Hudson river, out of all question, is the property of the State, and the State could not commit a *purpresture* on its own property. If it is a nuisance of this particular kind, called a *purpresture*, as against the government of the United States, then it is so because the United States owns, or is the sovereign over, the soil of the Hudson river, and not the State of New York, and because the bridge will be an unlawful obstruction to *their* river. If the United States do not own the soil of the Hudson river, then whatever else the bridge may be, it is not a nuisance of the kind called *purpresture*. It would be difficult to maintain that a State could commit a nuisance of any kind against the United States; but if, by reason of the supremacy of the National Government in particular things, the erection of this bridge, though

authorized by the State, would be an unlawful obstruction to a public river where that government commands, and hostile to the constitution and laws of that government, and, in this sense, something to be called a public nuisance; if this be all so, there is no reason why the Court should, but every reason why it should not, entertain a suit and motion to put down the supposed nuisance at the instance, and solely in the interest, of a private party, who has an adequate remedy at law for his private injury, if he sustains any. Certainly it would be safer to wait for the proper law officer of the government, whose business it is to take care of the public interests in this regard, if there be, or is likely to be, any such nuisance as is charged, to complain of the bridge, and ask the Court to apply the proper corrective.

VI.

The question whether the bridge in this case will, if erected, be a public nuisance, assuming now that the Court can and will entertain that question on these Bills of complaint, turns, of course, on the point whether it will create an unlawful obstruction to that free navigation of the river to which the public are supposed to be entitled, and which the complainants insist is secured to the public by the Constitution and the legislation of Congress.

Allowing then, to the Act for granting licenses for the Coasting trade, and to the licenses granted under it, all the authority and effect which can be claimed for them as conferring a personal right on all who hold them, to

the free navigation of the Hudson river, and of all the rivers and public waters of the United States, the question now to be considered is, will the proposed bridge, if erected as authorized and prescribed by the law of the State, so unlawfully obstruct the free navigation of the Hudson river as to amount to a public nuisance, and a public offence against the United States? I admit, in this connection, that whatever may be the right of the complainants under their licenses, the same right of free navigation belongs, or may belong, to the whole people of the United States. The question here presented necessarily involves the consideration of a supposed conflict between the authority and laws of the two governments, State and National.

Certain points of doctrine in regard to repugnancy and conflict, are deemed to be too well settled in this Court, to require that anything more should be done than to state them. The power of Congress "to regulate commerce with foreign nations, and among the several states," is an exclusive power; but the power is dormant until Congress legislates in execution of it. A measure adopted under State authority, and under an acknowledged power, which may affect commerce in some particular wherein Congress has the power to legislate but has not done so, would not be an unconstitutional act on the part of the State. To make repugnance or a conflict in such a case there must be something more than the mere delegation of the power over commerce to Congress; there must be Congressional legislation covering the subject. (Gibbons v. Ogden, 9 Wheat. R. 240, and Willson v. Blackbird Creek Marsh Co., 8 Curtis 105.)

There is no direct repugnance to the constitutional provision which clothes Congress with the power over commerce, in the measure which the legislation of the State has authorized in this case. If this legislation, however,

is so in conflict with any act of Congress passed to regulate commerce, that the legislation of both governments cannot stand, as a practical thing, but one or the other must give way, then that of the State must yield. This conflict of laws, if practically developed in an irreconcilable conflict of measures, or of rights, under such laws respectively, makes the State legislation inoperative under the provisions of the Constitution.

Now the complainants claim that Congress has legislated under its power to regulate commerce, in the Act which provides for the licensing of vessels for the Coasting trade, and that they are armed with the authority of licenses under that Act, and are thus entitled, as are all persons armed with the same authority, by the express legislation of Congress, to the free navigation of the Hudson. They add, that that right of free navigation extends up the river to Troy, because Congress has made Troy a port of delivery.

Taking the right then, as here stated, will the proposed bridge, if erected as authorized, so materially obstruct the navigation of the river that the reasonable right of the complainants, and others, to the free navigation, as claimed to be secured to them under their licenses, cannot be enjoyed, but will be unreasonably interrupted and injured by the effect of the bridge? Is there anything in the allegations and proofs before the Court to authorize it so to pronounce and declare?

The complainants do not, as I understand them, go the extravagant length of maintaining that their licenses give them an absolute and unrestricted right to enter the waters of New York free from any question, impediment, hindrance or delay, by or under the authority of the State; or to sail their vessels on the waters of the Hudson river, in the channels, or along the shores, wherever there was water enough to float them at the date of their licen-

ses, or at the date of the Act under which the licenses were granted, free from any obstruction, hindrance or difficulty of any kind, however slight, created by, or under the authority, of the State.

It is more than three-quarters of a century since the Act for granting licenses for the coasting trade was passed, and during all that time vessels licensed for that trade have been navigating the Hudson river. Within that period the State has done, or authorized, a great many things which have affected the navigation. Wharves and piers, carried far into the river from its original shores, have been constructed at New York, and Albany, and various other places. Nobody has ever complained of these, and they are not now complained of. Every one of these constructions is an encroachment, to a greater or less extent, on the free, natural flow of the river, and on the full freedom of navigation upon it in its natural state. Ferries are established across the river at various places under State authority. There are four steam ferry boats in almost constant motion at Albany. And every ferry boat on the river is in some degree an impediment to free navigation. A bridge exists at Troy, below the flow of the tide, which can only be passed by a narrow draw. A dam exists higher up, but still below the flow of the tide, which can only be passed by locks. All these are obstructions or impediments to free navigation, existing by State authority, and are not complained of. Throughout the United States, in all the navigable waters, the like obstructions and impediments have been created by State authority, and seldom, if ever, questioned. The State has a Quarantine establishment, standing guard perpetually over the entrance into its waters, and there foreign vessels, and vessels of the United States, both of the military and mercantile marine, are arrested and detained for hours, days or weeks, as a sanitary measure, at the plea-

sure of the State, and solely under State authority. If Mr. Frederick W. Coleman should come along with his coasting schooner, the Vintage, from Barnstable, in Massachusetts, and should come to this Quarantine ground with a pestilence on board, his vessel would be arrested until he could get permission from State authority to pursue his voyage up the Hudson river. Here is a liability to a more serious interruption to the perfectly free use of the navigable waters of the State, to a longer delay, and to heavier loss and damage, than any ever likely to arise from any bridge over the Hudson. But nobody doubts, the complainants do not doubt, the right of the State to interfere thus far, and in this manner, with the rights of free navigation, as claimed to be secured by the legislation of Congress, under the power to regulate commerce.

It cannot, then, be claimed by the complainants, that the rights of navigation in the Hudson river as secured to them by the legislation of Congress, and their licenses, are so absolute, that they are subject to no obstruction, impediment, delay, or restriction whatever, and no matter how inconsiderable, from the legislation and measures of the State. The legislation of Congress is paramount, and nothing in State legislation which directly and absolutely contravenes it, can stand. But much of the legislation of both governments may stand, notwithstanding a partial interference. The power to regulate commerce belongs to the General Government. That is one power. The power of police, under which quarantine and health laws are made, and the power to make roads and establish ferries and bridges, belong to the State. These are distinct and independent powers. They belonged to the State originally, when its sovereignty was absolute, and they were not taken away by the Constitution. If they are, in a certain sense and degree, subject to the power

of Congress over commerce, yet the original powers remain, and are still powers of sovereignty. When these independent powers are exercised by the respective governments, partial interferences and collisions are liable to arise in the measures they may authorise, or in the rights they may protect. But such partial interferences and collisions do not make the laws of the respective governments so absolutely incompatible and repugnant, that they cannot stand together. Wherever the laws of both can have a fair and reasonable operation and effect, both must be maintained. Without this principle, it would be impossible to maintain our complex system, impossible to make it operate in harmony, and secure the immense advantages which our daily experience shows us flow from the wise and beneficent adjustment of the powers of government in our State and National organizations. It has been the fixed policy of the country to maintain the principle to which I have referred. Congress adopts the pilot laws of the States, even while the power of the States to pass such laws is doubted. Congress passes laws to encourage and aid in the full execution of the quarantine and health laws of the States, though these laws materially interfere with that freedom of navigation which is supposed to be secured to all vessels sailing under its authority. (Ch. J. Marshall's opinion in Gibbons vs. Ogden.) Congress adopts the roads of the States for its post-roads, and for its military roads, though the power to make such roads for itself can hardly be doubted.

The question between the proposed bridge in our case, and the rights of free navigation supposed to be secured by the authority of Congress, must stand on this same principle and policy. Will the bridge be such an obstruction that the law of Congress in reference to licenses, giving it, in general terms, the construction which the complainants attribute to it, cannot have a fair and reasonable opera-

tion? Will it be such an obstruction that the rights of the complainants to the free navigation of the river, under licenses supposed to be intended to secure them from improper State interference, cannot be fairly and reasonably enjoyed? May not the bridge stand, as a measure of public improvement devised by the State, and all fair and reasonable rights of navigation still remain to the complainants and the public, substantially as claimed by them?

The river is not to be closed by the bridge; that cannot be pretended. The bridge is to be adapted to the position it is to occupy, with special reference to the preserving of open and unobstructed channels under and through it, for all the navigation that will have occasion to use them, or the river above. Eight-tenths of all that floats there will pass freely under the bridge at all stages of water. For the rest, it will have one draw of 180 feet in width, or two draws of 110 feet each. It requires no proof, it admits of no denial, that this provision is ample for the passage of the largest vessels navigating the river. It is a plain mathematical fact. The "Great Eastern" could pass through with ease, if there was water enough to float her. It is not a question whether the passage with the bridge will be as wide and ample as it is without it. It is not a question whether there may not, at times at least, be some little difficulty, some little inconvenience, some little detention, some little hazard even, in passing the bridge. Not only some little of all this, but a great deal of it all, is incident to the very nature of navigation, as well on rivers, as in bays and harbors, and on the open sea.

It seems clear that a vessel cannot move between Albany and Troy without encountering inconveniences quite as great as any to be met with in passing the pro-

2919

posed bridge. Tows, as they are called, some acres of craft spread broad and long over the river, and dragging their slow length along, often to the great annoyance of other vessels and interests of navigation, may not be able to pass the bridge without some temporary diminution and lowering of their huge proportions and pretensions. If they cannot pass in grand column, they may easily break ranks a little, and so pass. They have to do this in other parts of the river. Grand armies have to do the like in all their marches. The river was not made for tows alone, of the Leviathan order. Such things were not dreamed of when the license law of Congress was passed. They are entitled to all due consideration, but not to any monopoly of rights or accommodation on the river.

The true question is, will the bridge, instead of closing the highway of the river, leave a liberal and ample gateway for every thing that floats there? If it will, then we say there is no real collision, no incompatibility between the bridge, as a beneficent measure of public improvement under the authority of the State, and the rights of free navigation, as supposed to be secured under the authority of Congress. The complainants and the public may still navigate the highway of the river freely, while a noble highway athwart the river, equally demaded for the use of the public, is also secured. To complain, or talk of such a measure as a public nuisance, seems to me to pervert language, and heap contempt on truth and reason.

What is "free" navigation? We have seen that those who claim free navigation, are still forced to submit to some abatement of the idea of an absolute and unrestricted scope and verge for the sailing of their craft. Freedom of navigation is a thing not difficult to be under-

stood. It is perfectly well defined in practice on European rivers, and the Publicists are not silent on the subject.

Vattel, when treating of the common right of navigating public rivers under the regulations of the sovereign, says:

"This right necessarily supposes that the river shall remain *free and navigable*, and therefore excludes every work that will *entirely* interrupt its navigation." (Vattel, Chitty's 7 Am. ed., pp. 123-4; B. I. sec. 273.)

The doctrine is that a river remains free and navigable, so long as its navigation is not *entirely* interrupted. Wharves and piers, and bridges with draws, do not entirely obstruct navigation, but leave the navigation open, and therefore free, in respect to physical obstructions.

When the navigation is thus left open, and is not embarrassed by oppressive duties and regulations, then it is free in the accepted European sense, and according to the doctrine of the Publicists. (1 Kent's Com., p. 35, 2d ed.)

In 1815, the European Powers, by the treaty of Paris, established the freedom of navigation on the Rhine, and made arrangements for extending the principle to other European rivers, which, like the Rhine, separated or traversed the territories of several States. The movement was made upon a Memoir of Baron William Von Humboldt, the Plenipotentiary of Prussia. A reference to the proceedings and papers will show that the freedom of navigation sought to be achieved, was the exemption from the various and vexatious commercial and custom-house regulations and impositions of the several riparian States, which had always greatly impeded navigation, and sometimes had shut up a river entirely. In the final act of the Congress of Vienna, it was declared that the navigation of these rivers should be "entirely free" ("*entière-*

ment libre") and could not, in respect to commerce, be interdicted ("*interdite*") to any body. (Wheat. Hist. Law of Nations, pp. 498—504.)

Minute provisions were made for the regulation of commerce, and the imposition of duties, by laws of common obligation among the riparian States, leaving to these States respectively their rights of sovereignty in all other respects. No stipulations were made, or suggested, to restrain the several riparian States from physical obstructions to the navigation by means of bridges, or other necessary erections. Bridges then existed, and more exist now, over these rivers—many of them to be passed only by means of draws. No necessity was felt for any special provision on this subject. Besides that no apprehension could be entertained that any riparian State would wholly shut up the navigation and commerce of its own river by physical obstructions—which must always be an act of suicidal folly—the law of nations provided for the case, if it should ever occur. The impediment to navigation which constituted the whole danger and the whole evil, was the various and conflicting regulations, duties, and exactions which the several riparian States were at liberty to, and did, impose on the commerce and navigation of the rivers which were common to these States. When commerce and navigation were regulated by a law of common obligation to them all, then the navigation was "entirely free." It was assumed that the navigation would remain *open*, because, by the law of nations, no State could establish a work, be it a bridge or any other, which, in the language of Vattel, would "entirely interrupt navigation." Every riparian State would take care to leave the navigation open at least to its own citizens, and just as it was open to them, would it be open to the citizens of the other riparian States. A navigation thus

open, and at the same time relieved from the impositions and exactions of particular States, and placed under a common law of commercial regulation, was an entirely "free" navigation in public law, and in common sense.

It is manifest that what was thus accomplished—after all, not in the most perfect manner—by the powers of Europe in 1815, in establishing freedom of navigation on their rivers, had been done in the most perfect and complete way, by the Constitution of the United States in 1787, in establishing freedom of navigation on all the navigable waters of the United States.

Before the Constitution, the same evils of separate and rival commercial regulations among the several States in this country had existed, as afflicted navigation and commerce on the European rivers, and it was exactly these evils that were sought to be, and were, effectually corrected and remedied by the provisions of the constitution. When the separate States had been forbidden to lay duties on imports or exports, or duties of tonnage, and the general regulation of commerce was confided to a common government, which all the States were bound to obey, and when, in addition to all this, it was provided that no State could give privileges and immunities to its own citizens to which the citizens of other States were not also entitled; when all this was done, freedom of navigation on all the navigable waters of the United States, was effectually and abundantly provided for. If, as the complainants here maintain, it belonged to Congress as a part of the power to regulate commerce, to provide by legislation against improper physical obstructions to navigation by the erection of wharves, piers, or bridges, under State authority or otherwise, and if Congress, as they maintain, has made that provision by its legislation in regard to licenses for the coasting trade, still the question remains, in respect to erections, made under State authority, in or

over a navigable river, and which produce physical impediments to the navigation—when do they, and when do they not, leave the navigation open and free, in a proper and just legal signification? I know of no legal definition which the Court can apply to the subject but that which is derived from the law and the practice of nations. There can be no other safe rule. The law of free navigation in regard to physical obstructions in the rivers of the United States, created under State authority, still subject as such rivers are, confessedly, to the general sovereignty and jurisdiction of the several States within which they run, cannot be any other than that of the established law of nations. No other rule is adapted to the case. The Constitution provides no new rule on the subject; Congress has prescribed none; and surely this Court cannot make one.

The rule of the law of nations, in regard to physical obstructions, as I understand it, is, that if the navigation be left open to all who are entitled to use it, as it is to the citizens of the State making the erections, the navigation is free. If, for example, a low bridge is erected over a river by the sovereign entitled to make the erection, and the navigation is left fairly open by means of a draw, the navigation is free from any unlawful physical obstruction.

What constitutes then the full freedom of navigation of a river in this country, as all over the world, is, 1st, such freedom from physical obstruction as shall leave the navigation fairly open—as by a proper draw in a bridge; and next, freedom from such special legislation, exactions, impositions and regulations as separate riparian States might impose, and the subjection of the commerce and navigation to a common law of regulation, which all are bound to observe, so that all who are entitled to use the highway of the river enjoy equal rights and equal privileges in the navigation. This is what I understand constitutes in full,

in all its length and breadth, that free navigation of the Hudson to which the complainants, and the public, are entitled.

It is the physical obstruction to the navigation which is complained of in this case. And the position I take on that point, is that, inasmuch as the proposed bridge will be constructed with a draw, or draws, which will leave the navigation open to all who are entitled to use it, the navigation is perfectly "free," in the legal acceptation of the term as applicable to all public rivers, and free, too, in the whole common sense of the subject.

It is sufficient if the navigation is left "open;" and nobody has a right to complain of any necessary restrictions which may attend this new condition of the navigation. Good faith requires that it should be left *fairly* open—a condition abundantly secured by the interest which the State itself has in a free navigation. In this case, there cannot be a doubt that the navigation is to be left, not only open, but fairly and liberally open, and in that sense, the only sense in which the complainants or the public have a right to demand it, entirely free.

I am glad to believe that the view I have now presented, of what free navigation is, in respect to physical obstructions authorized by State authority, is in perfect harmony with the opinions and decisions of the Courts of the United States, in all cases where complaints have been made before them against bridges over public rivers.

In the Cuyahoga Bridge Case, (3 McLean, R. 226,) Mr. Justice McLean said: "A dam may be thrown over the river provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge." He said also in the same case: "A draw-bridge across a navigable river is not an obstruction."

The decision of the same learned judge in the Rock Island Bridge case, so far as he considered the question

of obstruction, and the open navigation furnished by the draw, was in accordance with his opinion in the case just referred to.

In the Wheeling Bridge case, the majority of the Court held the bridge to be an unlawful obstruction, because it was an absolute impediment, because, in fact, in their judgment, it shut up the river at that point, to a certain class of vessels accustomed to use it—the class of steamers with tall chimneys. It was not provided with a draw. And Mr. Justice McLean, who delivered the opinion of the Court, said: "If the obstruction be slight, as a draw in a bridge, which would be safe and convenient for the passage of vessels, it would not be regarded as a nuisance, where proper attention is given to raise the draw on the approach of vessels." In the dissenting opinion in this case, of his Hon. the Chief Justice, it was wisely said, quite in accordance with the opinion just quoted: "Bridges have been erected over many navigable rivers, and built so near the water, that vessels can pass only through a draw. Such bridges are unquestionably obstructions, and impede navigation. For where the vessels are propelled by sails, and the wind is unfavorable, they are often detained not only for hours, but for days. The Courts of the United States have never exercised jurisdiction over any of these obstructions, nor declared them to be nuisances." It is only necessary to add in reference to this case, that the decree for abatement which had originally been made, was subsequently modified by the Court so as to authorize a draw to be constructed, such as, in the opinion of an engineer to whom the matter had been referred, would fairly open the navigation to the class of vessels to which otherwise the bridge was held to oppose an absolute obstruction. Such a draw was declared to be satisfactory, though vessels would be obliged to leave the

principal and accustomed channel, and run an increased distance by another, to reach the draw.

These cases I think show a sufficient harmony with the doctrine which I have brought to the notice of the Court, with regard to physical obstructions under State authority in a navigable river. By this doctrine, when, as in this case, the Court sees that the State has made careful provision, by means of a draw in its proposed bridge, to keep the navigation fairly open, I think it is bound to assume that the draw will be sufficient for that purpose until at least the contrary is made to appear by practical demonstration after the erection is made. This I humbly think is the only convenient, the only safe, and the only legal course for the Court. But, at any rate, if the Court will entertain the question, and hear proofs in regard to the sufficiency of the draw before the erection is made, on a Bill in Equity by a private party, at least it should insist that the case against the sufficiency of the draw shall be made out with a certainty which shall leave nothing to doubt about.

The proposed bridge with a draw, authorized by the State, is *prima facie* a lawful bridge. It is not an obstruction by the test of the only rule of law which can be applied to the subject; it leaves the navigation fairly open and free. The opening will be ample, and the arrangements ample, to admit the easy passage of any vessel navigating the river. There will be a very wide draw, and comparatively a very narrow vessel to pass it. No testimony could impeach that broad fact. And with this fact alone I insist that the bridge is a lawful one. If delays and difficulties may occur, still they cannot impeach the lawfulness of the bridge, unless they are shown to be such as must amount to a practical impediment to the passing of the draw, so great that parties

2927

engaged in the navigation would be likely to abandon it as no longer free. No such difficulties or delays have been shown; none such can be shown in the nature of the case. The navigation will be fairly open, and therefore free—free in the sense of international law—free in any sense of the license law of Congress, which can be fairly attributed to it—free in the sense of the licenses granted under that law, even when taken, after the construction of the complainants, as a warrant of title in all who use them to the free navigation of the river.

VII.

But I come now to look at the case in another view. I hope I have shown that the proposed bridge will not be an unlawful erection and a nuisance, even if it be admitted that Congress, in the shape and guise of a regulation of commerce in respect to the coasting trade, has actually passed an Act, the object of which was to prevent and prohibit improper and undue obstructions by bridges, or other erections, in navigable rivers, and to control State legislation in relation to such erections. But I must now deny that Congress passed the Act for licensing vessels for the coasting trade, or that it has ever passed any Act, with the object and purpose thus attributed to it. I deny that there is any legislation of Congress of any kind, that purports to have any such object in view, or that can bear any such interpretation without an utter perversion of all the canons of interpretation usually applied to statutes.

In the Wheeling Bridge Case, certain general legislation of Congress for the regulation of commerce on all

the navigable waters of the United States, in "licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, &c.," and also the sanction by Congress of the compact between Virginia and Kentucky, for the free navigation of the Ohio, were referred to by the Court as sufficient to warrant the Court in declaring the bridge as built, to be an obstruction, and a public nuisance.

But the Court can only administer the laws of the United States, not make them, or supply any defects in them. The question is, has Congress declared a bridge over a public river, or any erection of the sort, producing an impediment to navigation, to be an obstruction, and a public nuisance. If it has, the Court may administer that law by so pronouncing; if it has not, there is no law on the subject for the Court to administer.

Nothing, it seems to me, can be clearer than that Congress has adopted no system of legislation, and no Act of legislation, to prohibit or prevent obstructions in navigable waters. It has adopted no legislation which indicates any such object. No Act could have ever have been passed for such a purpose without eliciting debate, or without arousing attention, and, I may add, without the strongest opposition. There cannot be a doubt that the States are perfectly competent, and always perfectly ready, to prevent and punish any unauthorized obstructions in the navigable waters within their respective limits. As for the States themselves obstructing their own navigable waters, in any way to be a fit subject of complaint by their own citizens, by other States, or the citizens of other States, they no more need the guardianship of Congress, or of the Courts of the United States, to prevent such mischief, than they do to restrain them from breaking up their roads and railways, and filling up their canals, or setting fire to their own capitals, or burning up their own

commercial cities. If Congress had ever legislated on such a subject as this, everybody would know it; the legislation would be plain and palpable, and the Courts would not have been left to grope in the dark after the law.

The laws passed by Congress for the regulation of commerce are in no sense laws to prohibit or prevent obstructions to navigable waters. They do not express, or indicate, any such purpose, and they are, in no particular or degree, adapted to meet and cover such an object. They are general regulations, attending vessels wherever they go on the navigable waters of the United States, and into whatever ports they enter.

A license for the coasting trade is an authority to a vessel to visit any waters of the United States which it may find open and navigable, and any port of entry or delivery, or any port not one of entry or delivery, which it may find accessible. But it is no pledge to the owner or navigator of the vessel, to go before him to clear away any obstructions he may meet with. The act for granting licenses is not an act to prohibit or prevent obstructions, or to declare an obstruction a public nuisance, and make provisions for the proper abatement and punishment of such a public offence.

It seems to me there was still less in the compact between Virginia and Kentucky, and the sanction of it by Congress (if it was so sanctioned,) which could be construed, or tortured even, into a law of Congress to prohibit obstructions in the Ohio, and declare them a public nuisance.

Under the Constitution, all the navigable rivers of the United States, those in the west as well as others, are free rivers to all the citizens of the United States. The compact in the Ordinance of 1787, which was before the Con-

stitution, and the compact between Virginia and Kentucky, do not make the western rivers more free than the Constitution makes them, by various special provisions in relation to duties, navigation and commerce, and by declaring that the privileges and immunities of the citizens of each State shall be common to the citizens of all the States. All highways, whether of water or on land, which are common to the public of a State, are common to the public of the United States. The easement of a navigable river is for the use and enjoyment of the whole people. The whole design of the compacts referred to was to secure this very advantage, which is now so effectually secured everywhere by the Constitution. The whole object was, not to prevent physical obstructions in a river by the authority of a State, which no State could make or authorize without doing itself and its own citizens more harm than anybody else, but that the citizens of other States should be put on an exact equality with the citizens of the State within which a river might run, in regard to the use and enjoyment of the easement of such river. (Opinion of Ch. J. Taney in Wheeling Bridge case, 19 Curtis, p. 649.) The Constitution now secures this object perfectly. No State within which a navigable river runs, can impose any burthens, any disabilities, any restrictions or conditions upon the vessels or citizens of other states in using the easement of that river, that are not equally imposed upon the vessels and citizens of that State. Any State legislation in violation of this rule, would be repugnant to the Constitution, and the remedy and correction could be easily applied.

All the regulations of commerce by Congress are framed with a steady regard to exactly this state of things. They are general rules, and generally of universal application. They secure the perfect equality of all vessels, and of all

2931

citizens of whatsoever States, on the navigable rivers of every State. A coasting license secures exactly this equality, and that is all it secures. It certifies to its possessor, if a citizen of another State, a perfect equality of rights in the navigation of any river, which that river affords, under the sovereignty and jurisdiction of the State in which it runs, to the citizens of that State. Beyond that it has no meaning, and no force, in respect to freedom of navigation. Congress has been content thus far, and I believe it will always be content, to leave the sovereignty and jurisdiction of the several States, and the general police of their own rivers, in regard to obstructions therein, untouched and unrestricted. And to construe the Act providing for coasting licenses, or Acts establishing ports of entry or delivery, as laws assuming Federal jurisdiction over all navigable rivers, and as enactments to prohibit obstructions and declare them a public nuisance; this I must hold to be a perversion of the plain intent and meaning of statute law, such as has no parallel with which I am acquainted.

I do not see why the decision in the case of the Blackbird Creek Marsh Company, does not entirely cover the position that Congress has passed no law the object of which has been to control State legislation in regard to bridges and other erections in navigable waters. There a close dam had been made across a navigable creek by State authority. And in a suit which involved the consideration of all the authority that could be given to a license for the Coasting trade, the Court held that Congress had not legislated in a way to control the State in this act of sovereign power.

VIII.

I have one other view of this case to present to the Court. I have considered the case on the assumption that Congress has legislated in a manner, and with the intent, to control State legislation on the subject of erections in, or over, the navigable waters of the United States. I have next shown, or endeavored to show, that Congress has not legislated with any such intent, or to any such effect. I come now, finally, to a question which lies entirely back of these, and of all other questions in the case—a question fairly arising in the case, one which it is quite time this Court should consider and decide; and the decision of which, in accordance with the view which I entertain of it, would not only dispose of the whole issue between these parties, whatever might be the opinion of the Court on the other points raised and discussed in the suit, but would settle and quiet forever the whole disturbing subject, now so fruitful of litigation, of a supposed conflict between the National and State governments in regard to an important branch of sovereignty and jurisdiction over the waters of the United States.

The question which I have to present and discuss, is this: Has Congress, under the power "to regulate commerce with foreign nations, and among the several States," authority to pass laws to prohibit, or to remove, what it may deem obstructions to navigation, in the navigable waters of the United States, by erections therein, under State authority, exercised within the territorial limits of the States respectively; or to prescribe terms and conditions on which such erections may be made, or to regulate the same; and by such Congressional legislation to control or restrict State legislation on the subject.

In other words, the question is, may the National Government, by its legislation under the commercial

power, oust the States of their sovereignty and jurisdiction over the navigable waters within their limits respectively, and itself assume jurisdiction so far as to command exclusively, in and over the same, and over the soil under the waters, in whatsoever may concern or affect the easement or freedom of navigation therein, due to the public; exercising all the powers of sovereignty over all the navigable waters of the United States, and over the land under these waters, which any sovereign can exercise over the navigable waters, and the land under them, within his own dominions?

I am perfectly aware that the power of Congress, which I here propose to dispute, has generally been assumed and taken for granted, in the Courts of the United States, without question or discussion. It has, however, only been assumed in the *dicta* of the Courts in delivering opinions. No case, so far as I am aware, can be deemed to have been made to turn or stand on this assumed power, possibly with the exception of the Wheeling Bridge Case; and there the question was not raised and discussed at the bar, or considered and decided by the Court. The power was merely assumed, and thus alluded to in argument. I hope, under all the circumstances, and considering the immense importance of the question, the Court will not think we are too late in raising that question now, and asking for a solemn decision upon it.

All navigable waters within the State, such as the common law calls navigable, are a part of the domain of the States in which they lie. A State owns the soil and bed of its navigable waters as far as the tide flows. Its jurisdiction over them is that of a sovereign. Its civil power over them is that of a sovereign. Navigable waters, within the dominions of a sovereign, are the property of the sovereign; the public, however, under the sovereign, has a right to the easement upon them for navigation.

But the sovereign may make grants therein, interfering in some measure, with the navigation,—as for fisheries and the like. The sovereign may even close the navigation for strong reasons of State ; as for sanitary purposes, or where public policy demands it. The case of the Blackbird Creek Marsh Company is an example. The right of the public to navigate a navigable river, is perfect as against all private and unauthorized obstructions. But the sovereign may, for reasons of State, create impediments to the navigation, and no subject or citizen has a right to complain of it, or can bring any action for injury to the rights of navigation, or injuries to property affected thereby. It is presumed the sovereign has good reason for the measures he may adopt, and if remote incidental damages follow from them, the citizen has no remedy but by petition to the sovereign. If the sovereign takes away his property by any public act, he must make compensation for it. These are general and familiar principles which need only to be stated to the Court, to receive its full recognition.

All this sovereignty and right belonged to every State in reference to its navigable waters, before the Constitution. The sovereignty was not taken away by any express provision in the Constitution, and transferred to the National Government. That Government is not declared to be the sovereign of any part of the proper domain of a State, whether it is land or water, or land under water.

It is true, Congress is clothed with power to regulate commerce, and it becomes a material question, how far Congress, by its legislation under this power, may control State legislation in the exercise of that sovereignty I have just been describing. The conferring of such a power does not take the sovereignty and domain from the State, and bestow it on the National Government. It does not

2935

affect the sovereignty until some legislation takes place in execution of the power; and what Congress may do, and what it may not do, in execution of this power, we must endeavor to ascertain and define. If it had been intended to transfer State sovereignty, over all the territory of the States covered by navigable waters, constituting so large a part of their domain, to the National Government, it would have been done with at least as much formality and explicitness as was observed in conferring exclusive government upon Congress, over the seat of the National Government, and over the places where its forts and other needful buildings are established.

I have already had occasion to show that the grant of Admiralty and Maritime jurisdiction does not affect the proper sovereignty of the State. It does not carry a cession of the waters, where these cases may arise, or the general jurisdiction over them.

It does not admit of a doubt, as I suppose, that the sovereignty and general jurisdiction over the navigable waters, within the boundaries of a State, remain with the State. The question then arises, how far may the legislation of the State, in execution of this sovereignty and general jurisdiction, be controlled by the legislation of Congress under the power to regulate commerce? Does this power authorize Congress to assume that sovereignty over the territory covered by the navigable waters of a State, which the National Government must exercise, exclusive of the State, if it is to command in and over the waters, in whatsoever may affect the condition, for practical use, of the easement therein, to which the public are entitled?

The power to regulate commerce is exclusive, to whatever extent it may be rightfully exercised by Congress. No State can exercise it, or any part of it. Whatever is, or may be a regulation of commerce, must be effected by

National legislation. And commerce includes navigation and intercourse. It is not confined to water, and places accessible by water. It passes inland, and moves on the soil, and inland waters, among the States. The power of Congress attends foreign and inter-state commerce, wherever it goes, for all necessary purposes of legal regulation; and this power is the same on the land as on the water. Whatever Congress may do in control of State legislation and State sovereignty on the navigable waters within a State, it may do on the land, wherever routes of foreign or inter-state commerce are, or may be established.

The history of commerce under the Confederation, reveals very clearly the mischiefs of independent State regulation, which were intended to be remedied by making the general commerce of the country national, and making one government responsible for its regulation. Commercial treaties could not be made or maintained, without this national power over foreign commerce. Without it, the foreign commerce and navigation of the country were under the sway of foreign powers. The whole navigating interest of the United States was liable to be sacrificed to the foreign navigating interest engaged in American commerce. Even that engaged in the coasting trade, and in the fisheries, was liable to the same disability and sacrifice, and hence the necessity of making the national power over commerce cover the trade between the States, a necessity made imperative by the interested, oppressive, and retaliatory legislation, between individual States, or classes of States, affecting most injuriously, not only the foreign and coastwise trade, but the internal trade between the States.

Much of the original mischief was directly met and prevented, by specific provisions in the Constitution. Congress cannot tax the exports from any State; nor abuse its power by giving the ports of one State preference

over those of another; or by requiring vessels bound to or from one State to enter, clear or pay duties, in another; or by laying any duties, imposts, or excises, but such as are uniform throughout the United States. And an effectual restriction is laid upon the States to prevent their laying duties on imports or exports, or duties of tonnage. Nor can a State confer any privileges or immunities in respect to commerce within the State, on its citizens, which will not equally belong to the citizens of other States.

For the rest, the regulation of commerce is left to the legislation of Congress. By the legislation of Congress, an American commercial marine is established, and a national character impressed upon the vessels and crews engaged in commerce; the shipping interest in the foreign trade is protected against injurious foreign legislation, or decrees; the coasting trade is secured to the home interest in shipping and navigation; convenient ports of entry and delivery are established, and custom house officers appointed to conduct the necessary business at such ports; vessels engaged in commerce are furnished with papers which fix their character and privileges, and coasting vessels receive a license from year to year, which is their warrant and authority to pass from port to port, wherever they find ports accessible, and to navigate the waters of the United States, wherever they find the waters navigable.

We all know that in the original movements, which resulted in establishing a new government, commerce was the chief thing considered. In the instructions to most of the delegates who met at Annapolis, the main thing required was, to enquire how far a *uniform system* in the commercial intercourse and regulations of the United States was necessary.

In the Constitutional Convention, in committee of the whole, on the several plans for forming a new government, the rule adopted as to specific powers to be given to Congress, was, that it should legislate in those cases "to which the States were separately incompetent, or in which the harmony of the States would be interrupted by the exercise of individual legislation." This rule applies to this commercial power as conferred by the Constitution. All the legislation of Congress which comes properly and directly under the head of this power, will be found to have had a general reference to the rule which confines such legislation to doing what the States are separately incompetent to do, or what, if attempted by them, would interrupt their harmony.

Without touching the question of disputed right, whether Congress has, or has not, authority to protect and encourage domestic industry, under the power to regulate commerce, I may remark, that the form of affecting the object, whenever duties have been laid *primarily* for protection, is strictly one of commercial regulation; that as a commercial regulation it is one to which the separate States are clearly incompetent, and one in which, if attempted, (as certainly it could not be) the harmony of the States would be necessarily interrupted by individual legislation.

But Congress has done many things, and the authority of Congress to do many other things is often claimed, which have some manifest relation to commerce; and the question is, where does Congress get the power to do them? Congress establishes and maintains light-houses, buoys, beacons and breakwaters, and has at times engaged in removing natural obstructions from bays, sounds and rivers. It has prosecuted for a series of years, and still prosecutes, at great cost, that most beneficent and magnifi-

cent work, the Coast Survey. Under what power is all this done? Not, certainly, as a direct exercise of the power to regulate commerce. A light-house, a buoy, or a breakwater is certainly not a regulation of commerce. Nor is the removal of a rock, or a sand bar, in navigable waters, a regulation of commerce. They aid commerce, but do not regulate it. They are a means of facilitating and carrying on commerce. But Congress has no direct authority to carry on commerce, or to supply the means of carrying it on, but only to regulate it as carried on. Nor can these measures properly come under the "incidental" power—that of making laws "for carrying into execution" the power to regulate commerce. They are not means "necessary and proper" for carrying any regulation of commerce into execution. They are not adapted to such an object. A regulation for the government of seamen on board of American ships; for conferring privileges on ships built and owned in the United States; for laying discriminating or countervailing duties; for granting licenses for the coasting trade or fisheries; such regulations of commerce are not carried, or aided in being carried, into execution by any of the measures just referred to. They may, and do, tend to protect, increase, multiply and facilitate commerce as and where it is carried on; but the execution of every act of commercial regulation is just as perfect without as with them.

If these measures are to be justified under any "incidental" power, it is rather under that of making laws for carrying into execution the power of Congress to lay and collect duties on imports; that is, the taxing power. As Congress is authorized to raise revenue by duties on imports, it might, with plausibility at least, be argued that to carry into execution this power in a way to produce the required revenue at the least burthen, it is

necessary and proper that measures should be adopted to increase, multiply, facilitate and protect commerce in all practicable ways, and that these measures are fitted and adapted to that object.

But the true constitutional ground on which these measures stand, is that of the direct and substantive power of Congress to make appropriations for such objects, of a national character, as are "for the common defence and the general welfare of the United States." This is taking the most natural and safe construction of this power, namely, that it is a power of taxation, but limited to objects and uses of a national character. The power to lay taxes, taken as an independent power, and subject to no restriction, would have been absolute and arbitrary, and Congress might have raised revenue and applied it to any purpose it might choose. But when the objects of raising revenue are especially limited to those of "paying the debts, and providing for the common defence and general welfare of the United States," taxation is limited and restrained, and the proceeds can only be applied to purposes of a *general and national* character within the purview of the Constitution. (Story's Com. Ch. 14.)

On no other just ground than this, can appropriations to make, or aid in making, internal improvements in roads, harbors, and rivers rest. Appropriations for light-houses, buoys, and breakwaters, for the Coast Survey, and for all the indispensable aids to the national commerce, rest properly, on the same firm foundation. I am not of the number of those who deny the power of Congress to appropriate money for the improvement of harbors and rivers. I think it has not done half as much of this sort of work as it ought to have done. But I do not find the authority for it in the commercial power. Whenever such an improvement is national in its character, object,

and importance, appropriations for it have an abundant warrant in that direct power which I have named. It is under this power, and not the commercial power, that Congress formerly made appropriations for the improvement of the navigation of the Hudson river above and below Albany ; and I think the general interests of commerce, and of the country, would have been greatly advanced if that policy had been duly prosecuted, instead of being virtually abandoned, as it was many years ago.

Here then, as I venture to think, is the legitimate and true constitutional ground on which appropriations for the class of objects just referred to rest, and the question before the Court is not embarrassed by any necessity of assuming, or supposing, that they have been made, and could only be made, under the power to regulate commerce, or the power *incident* thereto, as being "necessary and proper" to carry that power into execution.

There is nothing in the action of Congress authorizing these measures; nothing in their history; nothing in the Constitution, requiring or, as I think, authorizing the Court to set them down to the account of the commercial power.

There is nothing in the Constitution which places the jurisdiction of the waters of a State, in regard to the easement of the public therein for navigation, in the hands of the National Government, any more than it places the jurisdiction of the land, and soil of the State, in the same hands, in regard to the easement of the common roads and highways in it, when they are routes and highways of foreign or inter-state commerce. So far as the waters are navigable, and the easement remains dedicated to the use of the people of the State, they are equally open and free to the citizens of all the other States; and just in the same manner, the roads of the State are open and free to the use of all, because "the citizens of each State shall

be entitled to all the privileges and immunities of citizens in the several States."

In all this respect, there is no difference between the land and the water. The roads, railways and canals of a State are no more under the sovereignty and jurisdiction of the State, than are its navigable waters; and State legislation over the navigable waters of the State, in respect to their condition as highways of general commerce, is no more subject to be controlled by the paramount legislation of Congress, than is State legislation over its roads, railways and canals, where they are highways of the like commerce.

If the power to regulate commerce, or the power incident thereto, authorizes Congress by its legislation, to establish the supremacy of the National Government over the waters of a State, in all that concerns or affects their navigableness, it authorizes Congress also, and equally, to establish its supremacy over the main avenues and routes, in and through the land of the State, so far as they are, or can be made, the channels or highways of foreign commerce, or commerce between State and State. If Congress has authority, by the commercial power, to take the Hudson river under its sovereignty and jurisdiction, because it is a highway of commerce between the States, and can forbid any erections to be placed therein, by State authority, or any but such as Congress shall prescribe, it has the same authority to construct a road, a railway, or a canal through the State, between the Hudson river and Canada on the north, or Lake Erie and the States bordering thereon, and still further on in the west, and to exercise sovereignty and jurisdiction over such road, railway or canal, as highways of commerce, and forbid all erections in or over them by State authority, or all but such as itself shall prescribe. This precise power has been

claimed for Congress as a commercial power. (Story's Com. Ab., p. 454, sec. 633; orig. sec. 1269.)

According to this doctrine, Congress itself might have made the Erie and Champlain canals, as highways of foreign commerce, and commerce between State and State, with ports of entry or delivery at the termini; artificial rivers, the jurisdiction and control of which, for all the uses of commerce, would have belonged to the National government, with authority to keep the hands of the State government off from them, allowing no erections in or over them, not even a bridge, out of the many hundreds now thrown over them, but such as Congress might allow and prescribe. On the same principle Congress might have constructed the trunk or main lines of our railways, leading from the great commercial center of the State, to their northern and western connections with a foreign country, and with other States, and might have controlled them, as highways of commerce, against all interference of State authority.

Congress might go further. The railways and canals of New York, are as much highways of commerce, for foreign trade, and that between States, as the Hudson river, or any other river, or water in the whole Union. The trade between the United States and Canada through these channels, amounts to many millions annually; and that between the States to many times as many millions more. If Congress, under the commercial power, has a right to command in the channels and highways of foreign and inter-State commerce, for the protection of such commerce, by its paramount authority, as against State interference or control in the matter of physical obstructions,—then on principle, there is no reason why the National Government should not assume the sovereign command on the railways and canals of New York, constructed by the State, as well as on the Hudson river, for

the protection of the foreign and inter-state commerce therein, against State interference. It might legislate not only to make regulations for this commerce, by establishing ports of entry or delivery, along the line and at the termini of these routes, and by granting licenses of passage and navigation as in the coasting trade, but to prescribe and control the construction of all locks and bridges on the canals, and of all the viaducts and crossings of the railways, and of their gauge and grades. The right of the State to take tolls and fares, in consideration of the cost of these works, would probably be respected.

The internal commerce of the country is many times greater than the foreign commerce; and that part of it which is properly foreign and inter-state commerce, taking carriage and travel together, moving on the land, by way of the roads, railways and canals, can hardly be less than that moving on the rivers of the United States. If it is necessary and proper that Congress should assume the paramount jurisdiction over these rivers, so far as to control and direct all erections in or over them, and whatever else might affect their navigableness, it would seem to be equally necessary and proper that it should extend the like paramount jurisdiction over the land, so far as to control and direct all structures in or over the roads, railways and canals, used for foreign and inter-state commerce, and whatever else might affect their availability or utility, as the highways of such commerce. It would not be easy, I think, to find one reason, founded in principle, necessity, or propriety, and having reference to the power to regulate commerce, why Congress should exercise that sort of paramount jurisdiction which I have described, over the navigable waters of the several States, which does not equally require and demand, that it should exercise the same kind of jurisdiction over the land, wherever

great routes for foreign and inter-state commerce are, or may be established.

The fact that some of these waters of the States, flow into the ocean, and that the ocean flows into them by its tides, or the fact that some of them flow through, or between two or more States, cannot affect the general doctrine respecting this jurisdiction. The Constitution leaves these waters where it leaves the land, under the general sovereignty of the States. If in giving to Congress the power to regulate commerce, it authorizes that body to assume this particular jurisdiction over the waters, it must give it the same jurisdiction over the highways of general commerce on the land, for precisely the same object and under the same necessity. There is nothing in the nature of the power, or in the nature of the subject, to mark a distinction between the two cases. All that can be said about it is, that it might be a little less difficult for Congress to assert this jurisdiction on the waters than on the land.

The fact that these waters are natural highways, while roads, railways and canals, are highways of artificial construction, cannot affect the question before us. It is a question of sovereignty and jurisdiction, to be exercised for a specific object,—that of protecting commerce wherever it moves, on the water or on the land. If this is a necessary jurisdiction in the general government, on the water, it is necessary also on the land. If it is necessary in order to keep open and free, highways of commerce on the water, as against State interference, it is equally necessary, in order to keep open and free, highways of commerce on the land, as against State interference. The same motive, and the same interest, if any such can be conceived, which would lead a State to obstruct commerce on the waters under its jurisdiction, would lead

it to obstruct commerce on the land. There can be no doubt, I suppose, that, before the Constitution, any State might have shut up its navigable rivers, flowing wholly within its own limits, from the use of the citizens of other States, or admitted them on its own terms. It cannot now do this, except by closing them to its own citizens; an authority which it is safe to say can never be exercised over a river of any public importance. This authority does not differ in kind, and hardly in degree, from that which a State exercises over its roads, railways, and canals. They are highways for public use, subject to the general sovereignty of the State.

The change which the Constitution wrought in respect to navigable waters, was: First, that the navigable waters of every State, should be as free to the citizens of all other States, as to its own;—and next, that so far as they should remain free and open to its own citizens, being free and open to all the citizens of the United States, the navigation and commerce upon them (except that which might be purely domestic to the State) should be subject to the regulation of Congress. The Constitution wrougth the same change on the land. The highways of a State must be as free to the citizens of other States as to its own; and so far as they are free and open to its own citizens, being also free and open to all other citizens of the United States, whatever of foreign or inter-State commerce moves upon them, is subject to the regulation of Congress. In both cases, and equally, the sovereignty and jurisdiction otherwise remain with the State. It was no part of the purpose of the Constitution, under the power to regulate commerce, to clothe Congress with authority to assume the sovereignty over the channels and highways of commerce, within the several States, whether by water or land, to the exclusion of the States, in respect to what-

ever might concern or affect their condition and availability for the uses of commerce. That was a matter which belonged to the States, and was properly left to their control. It devolved on the General government to give uniformity and freedom to commerce, by its regulations, wherever that commerce, under individual enterprise and conduct, should find open and free highways for itself among the States, whether on the water or on the land, leaving those highways, and all that might affect their condition and availability as such, to the jurisdiction, control and care of the States.

The channels and highways of commerce in the States, wherever open, being made free to all the citizens of the United States, by express provisions of the Constitution, it remained only to make the commerce itself free—free from all partial and conflicting legislation of the States—and to give it a national character by such uniform regulations as Congress alone could make.

Happily, we have now the experience of seventy years to show the wisdom of this arrangement. The States have exercised this jurisdiction and control, almost without question, from the foundation of the government. They have never asked the leave of the General government to make any erections in or over their waters which they might see fit to make, any more than to make and govern their own roads, railways and canals on the land. In one instance only (that of the Wheeling bridge), has that Government, by any department of it, interposed to take this jurisdiction out of the hands of a State, or to dictate the terms on which it should be exercised. And in that case, the legislative department of the government came, in the end, to the relief of the State, by a public Act, sanctioning, so far as Congress could sanction, the exercise of State sovereignty on the subject. The

result in that case has shown too, that the apprehensions of great and irreparable injury, whether to individuals, or to another State, from the exercise of this kind of sovereignty by a State over its own waters, were unfounded, since scarcely an appreciable injury, I believe, has been felt by anybody, from the Wheeling bridge, and nothing in comparison of the vast public benefit of the work. From the origin of the government, the States have gone on, in the exercise of their proper jurisdiction over their navigable waters, constructing or authorizing piers, wharves and bridges, all of them, in some sense and degree, encroachments on the channels and highways of navigation, as they originally existed. In some instances, the accustomed channels of navigable waters have been closed, or changed, by dams, through which navigation can only pass by means of locks. In the Cuyahoga bridge case, Mr. Justice McLean declared that this was a proper exercise of State authority. And where a navigable creek was wholly closed by a dam, the act of the State received the sanction of the Supreme Court. It did so in the case of the Blackbird Creek Marsh Company.

And thus far in the history of the country not a case has occurred, so far as I know, where this jurisdiction in the States has been abused, or in any manner employed to create unnecessary, improper or injurious obstructions to navigation in its own navigable waters. To admit the supposition that a State could be found capable of such wickedness or such reckless folly, would be to assume that such State is unfit, from moral degradation, to be a government at all, or to legislate for the affairs and interests of its own people.

That there shall be rivalries between States to secure each to itself the great currents of trade and travel

between distant points of great commercial importance, is to be expected. But in these cases each will look to attain success, not by obstructing, but by improving and facilitating navigation, and the means of transit through its own territory. And if a State draws to itself advantages in this respect over another State, by its superior systems of internal improvement, or its superior natural position, the public interests at large are not injured by it, and the rival State has no right to complain.

The distinction between the jurisdiction which a State properly exercises over its own waters, and the jurisdiction over commerce which belongs to the General Government, is a broad and palpable one. What are regulations of commerce in order to make commerce free, is easily understood. The object has been accomplished in this country by special provisions in the Constitution, and by the legislation of Congress, which takes from the States all power to restrict, annoy or burthen commerce by partial and conflicting measures, affecting the objects or subjects of commerce, or the vessels or agencies employed in transportation and carriage.

The regulations adopted by the European powers to secure the freedom of commerce on the Rhine, and other rivers, were of the same character as those contemplated by the Constitution to secure the freedom of commerce on the waters of the United States. The object was accomplished without touching the proper sovereignty of the separate riparian States over the waters within their limits, beyond the necessary restrictions on their right to impose separate duties and burthens on the objects or instruments of commerce. Each State for its own sake would keep the channel of commerce open and free within its own dominions, while making such erections therein as the interests of its own people demanded. That was left to the sovereignty and judgment of the State.

I do not say that a State has any rightful authority to shut up a river, of any considerable importance to the commerce of the country, by physical obstructions, even when exclusively within its own territory, if it runs to the sea. Unimportant streams or creeks may be thus closed for sufficient reasons of police or public policy. It would be a matter between the State and its own people. But in regard to rivers that are really important to commerce, I believe the country might exist under the Constitution for a thousand years, and no such case ever occur. It is quite impossible to suppose, on any reasoning applied to what we know of human conduct, that any such case should occur, so long as the States of the Union remain this side of revolution and open war.

In the case of a river which traverses or separates two or more States, and goes to the sea, I hold it to be equally improbable, and impossible, that the navigation should be closed by any one of the States. There is no conceivable ground of interest, or commercial policy, which should lead the State, holding the mouth of such a river, to shut up the navigation against the States above. Connecticut cannot now stop the produce of Massachusetts, Vermont and New Hampshire, descending the common river between them, at the north line of the State, or at the mouth of the river, and demand duties upon such produce, or send up its own produce or merchandize burthened with State taxes, for the consumers above to pay. It is the very freedom of commerce on such rivers, made thus free by the Constitution and laws of Congress, and with which no State can interfere, that perfectly secures the freedom of navigation upon them, without taking from the States their sovereignty and jurisdiction over them, so necessary to the proper exercise of their powers of local government and police, and to those public improvements which are indispensable to their prosperity.

But if it be thought possible that a State next to the sea, on any ground of interest, or even in a spirit of hostility or injury to a State above, on a river common to them both, should close the navigation between itself and the State above, I suppose it would not be a case altogether beyond judicial cognizance and redress. Imagine the Connecticut river closed by a dam at the boundary between Connecticut and Massachusetts. Here would be "a controversy between two or more States"—a case to which the jndicial power of the United States extends, with original jurisdiction in the Supreme Court.

It is not doubted that this jurisdiction was given mainly with reference to disputed boundaries, or titles, between States. But the power is general, and may be applied to a controversy between States in respect to a right of navigation in a common river, as well as to a question of boundary. In questions of boundary, the Court takes cognizance of the cases on the express authority of the Constitution, and decides them upon the laws and usages of nations in disputes of that kind. (Opinion of Ch. J. Taney, in Wheeling Bridge case, 19 Curtis, p. 647.) A controversy between States in regard to the right of navigation on a common river, would also stand on the laws and usages of nations.

And in such a case, I suppose the right of the injured State would be clear. The United States have always maintained that the right of navigation on a river traversing, or separating, several independent States, and running to the sea, was a natural right in all such States, and was so held by the laws of nations. The States above have a right to an open passage to the sea, subject only to the authority of the States below to guard themselves against injury or serious danger. That was the right always maintained by the United States to the free navi-

gation of the Mississippi while Spain held the mouth of that river. And they have earnestly contended for the same right of free navigation on the St. Lawrence. If that is an American doctrine of international law as applicable to independent nations, much more is it applicable to the States of this Union, where the Constitution makes all commerce between them free, and thus greatly strengthens the obligation upon such of them as are below on common rivers, to keep the navigation of such rivers open and free to those States above which have a right to use them, even by the laws and usages of nations.

But, for myself, I do not hold it to be a supposable case that any such violation of the rights of navigation can ever occur, so long as the peace of the Union shall be preserved. The States must go far beyond the line of innocent rivalries under the Constitution—they must become hostile States, and enemies, before they can enter upon measures which can have no object but to see which can do the other most harm. An invasion of one State by the forces of another might as properly be anticipated. If the time should ever arrive when States of this Union shall come into collision, and madly indulge in acts of mutual hostility, it will be time enough then to consider how far the power of the general government may be employed, and in what form, under the Constitution, to meet the difficulty. Failing that, the conflicting and warring sovereignties of the country must be left to find, or make, an issue of peace for themselves, if they can, in their own way. When wars come to be flagrant, laws will of course be silent.

It is not necessary that I should say a word to this Court of the great importance of this principal question of power as between the National and State governments, on which I have now offered my views. If it belongs to

the National Government, it is a power which, if once entered upon, has no assignable limit. It is impossible to say where it would end. Certainly, the power being conceded, if we could suppose it possible it should ever be exercised to the full extent to which it might be carried, if once begun, it would leave the States little more than the shadow, and not a great deal of the substance, of sovereignty. Especially would they be stripped of power for some of the highest and most beneficent purposes of government, as thus far employed by them. Those works of public improvement which have been so extensively and happily prosecuted, and which are still carried forward, by the separate States of this Union, or under their authority, and which together constitute a connected system of vast extent and magnitude, and of incalculable value and importance to the nation, and which the National Government never would, and never could have prosecuted as they have been prosecuted by the States, or under their guardianship and power; how much of all these works, these noble signs and instruments of civilization and progress all over the country, would have existed to-day, if Congress had undertaken to press the commercial power conferred upon it, both on the land and on the water, to any thing like the dangerous extent to which it might certainly have been carried, if once entered upon, and acquiesced in? Nobody can say that the attempt would not have been most disastrous.

Fortunately, as I venture to think, and as I have endeavored to convince the Court, Congress does not possess this power over the highways of general commerce, so that in whatsoever might affect their condition and availability for the uses of commerce, the General Government might, if it would, command as sovereign over them all, to the exclusion of the States. Happily,

too, as I venture to think, and as I have endeavored to convince the Court, if Congress does possess this power, it has never exercised it. Certainly, as it seems to me, it has wholly refrained, by a settled and unbroken policy, from any attempt to push the commercial power to the extent of controlling, in any degree whatever, State legislation over the navigable waters within State limits, in respect to any works of public improvement in or over them, which a State might think the public interests demanded at its hands. If such has been the policy of Congress, from which it has not departed by any Act of legislation whatever, this Court, I am sure, if so convinced, will be quite satisfied and content not itself to disturb that policy, even if it had the power to disturb it.

With a country already so expanded as ours has become since the Constitution was framed, and destined, perhaps, to embrace still other and more distant regions and peoples, the problem of maintaining such a frame of National Government as the Constitution establishes, in necessary vigor, and, at the same time, in harmony with the separate political Communities which make up the Union, multiplied and multiplying as these separate Communities are, is one which no patriot mind, whether of jurist or statesman, can contemplate without the profoundest anxiety. No thinking man, I imagine, can be found at the present day, who supposes that our Federal system could be maintained at all, but for that ample measure of sovereignty for local government which the Constitution so happily leaves in the hands of the States. Every one, I suppose, now sees that any further weakening of the States, to add strength to the National Government, would have been fatal. The security of the system rests in the fact that every State is, and feels that it is, a real sovereignty and a real government, endowed with original powers, for all that most intimately concerns the welfare and happiness of

the people of such State, and is not a mere municipal Corporation with a modicum of authority borrowed from an imperial Power to which it owes its existence.

Nothing, in my judgment, could be more entirely fatal to our system than any disturbance, at the present day, by Constitutional interpretations, of the nicely adjusted balance of powers between the National and State Governments, as fixed by the Constitution. Both must have their own, and nothing which is not their own. And it must needs be remembered that the prerogative of the National Government, which makes it the interpreter and final adjudicator of its own powers, while it is an indispensable, is yet a fearful authority. It is not in the nature of any government voluntarily to abdicate or repudiate any of its just powers. Happy, thrice happy, if the General Government, marching up fully to this line, shall take care not to pass it by so much as the breadth of a hair. But what moderation, what forbearance, what lofty justice, what noble virtue, does not all this demand! And it is this Court to which the country must look as the grand exemplar of these high attributes.

This Court occupies a position of higher dignity, and of more awful responsibility, than attaches, or ever attached, to any other Judicial Tribunal on earth. While it cannot lift a finger of authority, except to administer the law of the land as between litigant parties immediately before it, precisely in the manner of the humblest tribunal of justice, yet, such is the nature of the jurisdiction it is sometimes called upon to exercise, the governments of the country, State and National, the States themselves, and the United States, are, at times, in effect, summoned into its august presence, and dismissed with its authoritative decrees resting upon them. Sublime as this power is, it is not greater than necessity demands; and on its strict preservation depends, in my

honest judgment, the issue of the great experiment we are making in the Science of Government. But how is this tremendous power to be preserved, so that it may commend itself to the continued and unabated reverence, submission and obedience of the country? To this question there can be but one answer. While maintaining, with a courage that must never falter, all the just powers of the Government of which it forms an integral department, and all its own just powers, its very existence is staked upon the careful and scrupulous abnegation of all unaccorded or doubtful authority, whether in itself, or in the government of which it forms a part.